





















## English Ruling Cases

CITED "E. R. C."

CONTINUED BY

## British Ruling Cases

CITED "B. R. C."

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*The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.*



# English Ruling Cases

ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.

OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

IRVING BROWNE

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VOL. VIII.

CRIMINAL LAW—DEED

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## PREFACE TO VOLUME VIII.

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THE eighth volume of *RULING CASES* contains nine capital topics, — “Criminal Law” to “Deed.” The cases selected under the topics “Criminal Law” and “Crown” have, in particular, afforded opportunity for interesting discussion of principles from the English and American points of view. The American notes to *Reg. v. Tolson*, pp. 44 to 60, are especially valuable as a contribution to comparative jurisprudence, relating to the principle “*Mens rea*.”

The plan of *RULING CASES* is now so far developed as to afford almost a certainty of the work being completed in twenty-five volumes, as originally estimated.

It will be found that, in nearly all English and American legal compilations which are based on an alphabetical arrangement, a comparatively large bulk of the work is occupied by headings under the first three letters of the alphabet. This proportion is enhanced in the present work by the system of dealing with each subject under the earliest convenient heading. Thus “Abandonment” and “Deviation” fully deal with large branches of “Insurance”; “Abatement,” with topics usually found under “Parties” or “Practice,” etc.

As to the title “Practice,” which occupies so large a space in most Digests, only a small part deals with points of general interest, so as to come within the scope of the present work; and, probably this maddening title will be omitted altogether, — the questions involving principles of general application being dealt with under other heads.

R. CAMPBELL.

*April, 1896.*



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# RULING CASES.

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## CRIMINAL LAW.

SECTION I. Jurisdiction.

SECTION II. *Mens rea*.

SECTION III. Evidence.

SECTION IV. Procedure

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### SECTION I. — *Jurisdiction*.

No. 1. — REG. *v.* ANDERSON.

(C. C. R. 1868.)

#### RULE.

A PERSON not in the allegiance of the English Crown is amenable to the English Courts having criminal jurisdiction for offences committed by him, while within the territorial limits of the English Crown. The rule applies to the criminal jurisdiction of the Admiralty of England, and as so applied extends over British ships, not only on the high seas, but in rivers of a foreign country where the tide ebbs and flows, and where great ships go; although there is a concurrent jurisdiction in the Courts of the foreign country.

#### Reg. *v.* Anderson.

L. R., 1 C. C. R. 161-171 (s. c. 38 L. J. M. C. 12; 19 L. T. 400; 17 W. R. 208;  
11 Cox C. C. 198).

*Criminal Law. — Jurisdiction. — International Law.* [161]

The Admiralty Jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs and flows, and where great ships go.



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All seamen, whatever their nationality, serving on board British vessels, are amenable to the provisions of British law.

An American citizen, serving on board a British ship, caused the death of another American citizen, serving on board the same ship under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges where the tide ebbed and flowed and great ships went: —

*Held*, that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court.

THE following case was stated by BYLES, J. : —

James Anderson, an American citizen, was indicted at the Central Criminal Court for murder on board a vessel belonging to the port of Yarmouth, in Nova Scotia; she was registered in London, and was sailing under the British flag. At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half way up the river, and was at the time of the offence about 300 yards from the nearest shore; the river at that place being about half a mile wide. The tide flows up to the place and beyond it. No evidence was given whether the place was or was not within the limits of the port of Bordeaux. It was objected for the prisoner, that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the Court had no jurisdiction to try him.

I expressed an opinion unfavourable to the objection, but agreed to grant a case for the opinion of this Court.

The prisoner was convicted of manslaughter.

[\*162] \* M. Williams, for the prisoner. The Court had no jurisdiction in this case because the prisoner was an American citizen, and in a foreign territory, at the time the offence was committed. The Admiralty authorities had no power to send the man back to England for trial.

BOYLL, C. J. The case does not raise that point. The question in the case is, "Being here, could he be tried?"

BLACKBURN, J. *Sattler's Case*, D. & B. C. C. 525, decides that even if wrongly brought here it makes no difference.]

The 267th section of the Merchant Shipping Act, 1854 (17 &

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18 Vict. c. 104),<sup>1</sup> was relied on by the Crown at the trial. It has no application to this case because it applies only to British seamen, whereas the prisoner here was an American citizen. In Lewis on Foreign Jurisdiction, p. 25, it is said, "It seems that under this provision" (Merchant Shipping Act, 1854, s. 267) "a theft, or even a common assault, committed by a British seaman upon a native in a foreign port might be the subject of an indictment under the Admiralty jurisdiction in England. It is possible, however, that the very extensive terms of this enactment might receive some limitation from judicial interpretation." The author clearly thought the section must be limited to British subjects.

[BLACKBURN, J. The expression, British seaman, may mean one who, whatever his nationality, is serving on board a British ship.]

The section in question must be limited to British subjects. The legislature cannot legislate for the subjects of a foreign power. The 18 & 19 Vict. c. 91, s. 21, professes to legislate for offences \* committed on board ship on the high seas by [\* 163] those not British subjects. If the legislature could make such an enactment, still the place in question is not the high seas. It was within the empire of France.

[BLACKBURN, J. It has been decided that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island.]

If it floats into the territory of another nation, it would cease to be so, and the jurisdiction of the flag would then be excluded. This man might have been tried in France.

[BOVILL, C. J. Even if he might, why should not this country legislate to regulate the conduct of those on board its own vessels,

<sup>1</sup> 17 & 18 Vict. c. 104, s. 267: "All offences against property or person committed in or at any place either ashore or afloat out of her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the

same Courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England."

The section is identical with the 687th section of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which constitutes the existing code.

so as to have concurrent jurisdiction? However, it would seem from Ortolan, *Diplomatie de la Mer*, Book 2, ch. 13, pp. 269-271, 4th ed., that the French local authorities will not interfere with transactions on board foreign vessels. They repudiate jurisdiction in such cases.]

Section 267 of the Merchant Shipping Act, 1854, professes to give jurisdiction three months after a man has left the ship. Under that provision an alien, who had left a ship, and returned to his own country and committed a crime two months afterwards there, might be tried and punished here. That could never have been intended. This was not the high seas. It was French territory where the ship was sailing, and therefore our courts have no jurisdiction. *Reg. v. De Mattos*, 7 C. & P. 458; *Reg. v. Depardo*, 1 Taunt. 26; Russ. & Ry. 134; 9 R. R. 693; and *Reg. v. John Lewis*, D. & B. C. C. 182, were also referred to.

Poland (Beasley with him), for the Crown. The 267th section of the Merchant Shipping Act, 1854, is not relied on in support of this conviction. The word "British subject" applies to an alien who resides in this country. 1 Hale, P. C. 542. This man is a British subject, as being subject to British law. In *Reg. v. Depardo* no decision was given. The man was released, it is true, but he was an alien enemy. In that case there was no protection afforded by our law, and therefore he was not amenable to it. In *Reg. v. De Mattos* the offence was committed on land out of the

United Kingdom, and the prisoner, a foreigner, had left [164] the service of the ship. He had \*ceased to be under

British protection and therefore ceased to be amenable to British law. The question here is, whether a person, killing another in a British ship afloat, is amenable to British law? A ship is a floating island, and it does not lose its character as such when in the river of another territory, but it still remains British, and subject to British law. *R. v. Jemot*, Old Bailey, 28th Feb. 1812, M.S., cited 1 Russ. on Crimes, 4th ed. p. 153, and Archbold's Crim. Plg. 16th ed. p. 395; *Reg. v. Allen*, 1 Mood. C. C. 494. Great inconvenience would ensue if that were not so. Crimes would frequently escape altogether unpunished. The French courts repudiate jurisdiction in the case of offences committed on board foreign merchant vessels by one member of the crew against another in French ports, unless the peace of the port is disturbed. They would take no cognizance of the offence

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in this case therefore. Wheaton's Int. Law (ed. 1864), pp. 203, 204; Ortolan, *Diplomatie de la Mer*, Bk. 2, cap. 13, pp. 303-305, 3d ed.; 269-271, 4th ed. Suppose the ship was in the waters of a savage country, if a person committing a crime could not be tried by the law of the ship, he would escape altogether. *United States v. Holmes*, 5 Wheat. 412. To give jurisdiction to the country to which a ship belongs, it is not necessary that the ship should be on the high seas at the time the crime is committed. It is sufficient if it be in tidal water even though that water be in the body of another country, and where great ships go.

[BLACKBURN, J. The latter limitation is necessary, otherwise a foreign country might claim jurisdiction over a crime committed on a boat belonging to one of its vessels though as far up the Thames as Teddington.]

*United States v. Willberger*, 5 Wheat. 76, seems to deny the jurisdiction of the nation to which the ship belongs when the ship is in the tidal river of a foreign power, but that case is opposed to *United States v. Coombs*, 12 Peters, 72, which shows that the jurisdiction exists in such cases. The true view of the law is, that if a British ship is in a foreign river, at a place where the tide ebbs and flows, and where great ships go, the jurisdiction of the Admiralty extends to her. *Thomas v. Lane*, 2 Sumner 1. The struggle in former times was between the Common

\* Law Courts and the Admiralty Courts. If a crime was [\* 165] committed on a river in this country, then a conflict of jurisdiction arose; but if the ship is in a foreign river, if the Admiralty has no jurisdiction, no Court has. The earliest statutes on the subject of Admiralty jurisdiction are 3 Rich. II. c. 3, and 15 Hen. VIII. c. 15, but those statutes were passed not to limit the jurisdiction, but to cure defects of venue in certain cases. 1 Kent's Comm. 10th. ed. pp. 409, 410. The American courts hold that the large lakes and rivers of that country are within Admiralty jurisdiction. *Genesee Chief v. Fitzhugh*, 12 Howard, 443. Even supposing that the country of the river had concurrent jurisdiction, that could not affect the question. The true test is, does the jurisdiction of the Admiralty extend to the place where the ship is sailing, *i. e.*, is the ship on the high seas, or in a tidal river of a foreign power, where great ships go? It is submitted that the ship in question did not lose its character as a British ship, by floating within a league of French territory



in a tidal river. Where the ship is in a foreign port, it loses its character as a ship, *United States v. Hamilton*, 1 Mason, 152; but it does not lose that character while in a river. The flag of the ship extends its protection over all on board, as long as the character of ship remains, and in return for that protection, every person on board owes allegiance to the law of the flag. The prisoner, therefore, was within Admiralty jurisdiction; he had the protection of the British flag and was therefore amenable to British law.

M. Williams, in reply.

BOVILL, C. J. There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and, as such, he must be taken to have been under the protection of the British law, and also amenable to its provisions. It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship, and was at the time a portion of its crew.

There are many observations to be found in various writers [\*166] to show that in some instances, \* though subject to American law as a citizen of America, and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle that the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation. With respect to France, M. Ortolan in his work, *Diplomatie de la Mer*, Book 2, ch. 13, pp. 269–271, 4th ed., says, that it is clear, that with regard to merchant vessels of foreign countries, the French nation do not assert their police law against the crews of those vessels, unless the aid of the French authority be invoked by those on board, or unless the offence committed leads to some disturbance in their ports. The law of France is very clear on this point. Amongst the instances mentioned are two cases of American vessels—one being in the port of Antwerp, and the other in the port of Marseilles, where, offences being committed on board, the Americans claimed the exclusive jurisdiction over their vessels; though being in foreign ports, they were vessels belong-



ing to America. As far as America is concerned, she has by statute made regulations for those on board her vessels in foreign ports, and we have adopted the same course in this country. When vessels go into a foreign port they must respect the laws of that nation to which the port belongs; but they must also respect the laws of the nation to which the vessel belongs. When our vessels go into foreign countries we have the right, even if we are not bound, to make such laws as to prevent disturbance in foreign ports, and it is the right of every nation, which sends ships to foreign countries, to make such laws and regulations. In the present case, if it were necessary to decide the question upon the Merchant Shipping Act, I should have no hesitation in saying that we have the power to legislate for those persons who place themselves under allegiance to us by becoming a portion of a British crew, and there would be no inconsistency in including foreigners in such legislation. What is the effect of the Merchant Shipping Act it is not necessary now to decide, and therefore I do not feel it necessary to enter into the question, for the Common Law of England, independently of the statute, is in my judgment sufficient to decide this case. Here the offence is committed on board a British vessel \* by one of her [\*167] crew. If this offence had been committed upon the high seas, there could have been no doubt upon the question either on principle or authority, and the offence then would have been committed clearly within the jurisdiction of the Admiralty, and therefore the Central Criminal Court would have stood in the same position as if the offence had been committed within its jurisdiction on land. Then, is the case different because the offence was committed, when the vessel was lying in the Bordeaux river, some miles from its mouth, and not in the open sea? The place where the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows and where great ships lie and hover. What difference is there between such a place and the high seas? The cases that have been cited clearly show that the Admiralty has jurisdiction in such a place; if so, the case stands precisely the same as if the offence had been committed upon the high seas. On the whole, I have come clearly to the conclusion that the prisoner is amenable to British law, and that the conviction is right.

CHANNELL, B. I am of opinion that the conviction is right.

The 267th section of 17 & 18 Vict. c. 104, has been referred to, especially by the counsel for the prisoner. I agree, however, with the view put forward by Mr. Poland, that it is not necessary to pray that section in aid, in order to support this conviction. I say that it is not necessary, because I especially wish to guard myself from saying that such a case may not fall within the statute whenever the point arises. I agree in thinking this Court must execute and exercise the power which is given by any English Act of Parliament, but I express no opinion as to whether the words used in that section are such as to cover the present case. In construing a statute of this kind we are at liberty to ascertain, as near as we can, what the international law on the point is, and construe the words of the statute in harmony therewith. I agree, however, with my LORD CHIEF JUSTICE that that point does not arise; when it does, it will be time to consider it. The ground of decision in my opinion is that the ship in question was within the Admiralty jurisdiction at the time the offence was committed, and that that of itself [\*168] is sufficient to support the conviction. It may \*not

be, however, that the ship was at the time on the high seas, but she was within the Admiralty jurisdiction. I come to that opinion from the views expressed by various text-writers, and from the authority of the case of *Reg. v. Allen*, 1 Mood. C. C. 494, and the American case of *Thomas v. Lane*, 2 Sumner, 1. There may be some difficulty in dealing with the case of *United States v. Willbergger*, 5 Wheat. 76, but it does not seem to me to be altogether conflicting.

BYLES, J. I retain the opinion I expressed at the trial. I told the jury that the ship being a British ship was, under the circumstances, a floating island, where the British law prevailed; that the prisoner, though an alien, enjoyed the protection of the British law, and was as much subject to its sanctions, as if he had been in the Isle of Wight. Two English cases, *Reg. v. Allen*, and *Reg. v. Jenot*, Old Bailey, 28th Feb. 1812, M.S., 1 Russ. on Crimes, 4th ed. 153; Archbold's Crim. Plg. 16th ed. p. 395, and two American cases, *Thomas v. Lane*, and *United States v. Combs*, 12 Peters, 72, have decided that in a river like the Garonne, within the flux and reflux of the tide, and where great ships go, a ship is within the Admiralty jurisdiction of the country to which she belongs. The only consequence of the ship

being within the ambit of French territory, is that, (the vessel not being an armed vessel) there might have been concurrent jurisdiction, had the French law claimed it. If the murder had been committed on shore, and it had become necessary to consider the international effect of the Merchant Shipping Acts, I should have required further time for consideration.

BLACKBURN, J. I am also of opinion that the prisoner was rightly convicted, and that it is not necessary to consider the effect of the 267th section of the Merchant Shipping Act, 1854. There are numerous cases which show that where English law would have had jurisdiction over a prisoner, the matter of venue is cured by statutes passed for the removal of technical rules, and that he could properly be tried in the Central Criminal Court. Then the question arises, had any of the Queen's Courts jurisdiction at all \* to try the prisoner? If any, the [\*169] Central Criminal Court had. There are a vast number of cases which decide that when a ship is sailing on the high seas, and bearing the flag of a particular nation, the ship forms a part of that nation's country, and all persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation. The question now is, is the Garonne at the place in question to be considered the high seas? The term "high seas" has had various meanings attached to it; but from the earliest times in this country the Maritime Court has had jurisdiction over what happens on the common ground of nations, and, further than this, from the earliest times in England, and I think abroad also, it has been established that the jurisdiction of the Admiralty extends over vessels, not only when they are in the open sea, but also, when in places where great ships do generally go. In the present case the ship had gone some miles up the Garonne, and it may be that she was in French territory, so as to give the French courts jurisdiction, had they chosen to exercise it; but not only have the French courts not exercised jurisdiction in this case, or in such like cases, but, as I understand, they have absolutely repudiated any such jurisdiction. Then the question is, has England jurisdiction over an English vessel in such a place, or would there be jurisdiction in the United States over an American ship which happened to be there? There seems to be no doubt that at a place where the tide flows, and

below all bridges, the Admiralty assumes to have jurisdiction at common law. I pass by the law as laid down in Hale's Pleas of the Crown, for it seems to me that the modern cases of *Reg. v. Jennot*, Old Bailey, 28th Feb. 1812, M.S., cited 1 Russ. on Crimes, 4th ed. 153, and Archbold's Crim. Plg. 16th ed. p. 395, and *Reg. v. Allen*, 1 Mood. C. C. 494, are those most closely in point. Those were both cases of crimes committed on board British ships at a time when they were lying, not in the open sea, but at some distance up a Chinese river. Each of these cases was held to be within the Admiralty jurisdiction, and consequently within that of the Central Criminal Court. In the American case of *United States v. Willberger*, 5 Wheat. [\*170] 76, the Court seems \* to have held as a fact that the ship was out of the Admiralty jurisdiction, but in *Thomas v. Lane*, 2 Sumner, 1, and *United States v. Coombs*, 12 Peters, 72, they give the grounds of their decision, not in conformity with the *United States v. Willberger*, but very much in conformity with the English decisions, and therefore I consider that the American courts would agree with us that the Admiralty jurisdiction would extend to this place; and so just as an American seaman on board an American ship at the place in question would have been triable in America, so a foreign subject serving on board a British ship can be tried here. The difficulty as to the statute legislating for those out of the scope of its authority, we must deal with when it arises. As a general rule, no doubt, we should construe a British statute according to the principles of international law, and should confine a legislative enactment to a British subject, or to a person subject to British protection. However, as long as the ship is at sea, we have no need of the statute. If the offence had been committed on land, or in harbour, it might become a question as to the construction of the statute. My present impression, however, is, that where a ship is sailing under a particular flag, the flag affords protection to all who sail under it, and the nation to which the flag belongs has a perfect right to legislate for all those on board, because she affords them that protection. Where a nation allows a vessel to sail under her flag, and the crew have the protection of that flag, common sense and justice require that they should be punishable by the law of the flag, and the 267th section of the Merchant Shipping Act, 1854, might properly be construed to



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mean that. The latter part of the section, where the three months' clause is introduced, affords more difficulty, but that point does not now arise. The one and only point decided in the present case is, that under the circumstances, the ship being within the jurisdiction of the Admiralty, the prisoner was properly tried at the Central Criminal Court.

LUSH, J. I also think that it is not necessary to resort to the Merchant Shipping Act, 1854, and therefore I offer no opinion upon its construction. I concur in the judgment of the rest of the Court upon the ground, that at the time the offence was committed, the \*vessel was in a tidal river and [\*171] within the flux and reflux of the tide, and, not being within the body of a county, was within the jurisdiction of the Admiralty. The prisoner was therefore properly convicted at the Central Criminal Court.

*Conviction affirmed.*

## ENGLISH NOTES.

The principal case may be compared with *Reg. v. Keyn* (C. C. R. 1876), No. 16 of "Conflict of Laws," 5 R. C. 946 (2 Ex. D. 68, 46 L. J. M. C. 17).

The principal case was followed in *Reg. v. Carr* (C. C. R. 1882), 10 Q. B. D. 76, 52 L. J. M. C. 12, 47 L. T. 451, 31 W. R. 121, 15 Cox C. C. 129. The prisoners in that case were indicted for receiving certain bonds and securities stolen from a British ship while she lay afloat but moored to a quay at Rotterdam. The prisoners were found guilty, but a case was reserved for the opinion of the Court, whether the conviction could be supported in law. It was necessary to show that the theft had been committed within the English territorial limits, in order to found the jurisdiction of the English Courts. The principal case was sought to be distinguished on the ground that the prisoner in *Reg. v. Anderson* was a member of the crew, and might be considered amenable by contract to English law. The Court however held that *Reg. v. Anderson* was strictly in point, and the conviction was accordingly affirmed.

The doctrine that the law of the country where a crime has been committed governs the nature of the offence, and that the Courts of that country have alone jurisdiction to try the offender, is a well established principle of international law. The proposition was discussed in *Macleod v. Attorney General for New South Wales* (P. C. 1891), 1891, A. C. 455, 60 L. J. P. C. 55, 65 L. T. 321, 17 Cox C. C. 341. In that case the appellant was married in 1872 in New South



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Wales. He subsequently obtained a divorce in the United States and there went through a second ceremony of marriage in the lifetime of the first wife. The prisoner was indicted under a section of the local Criminal Law Amendment Act, which provided: "Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude." The Judicial Committee held that, upon the construction of the whole statute, the word "wheresoever" must be taken to apply to the venue, and be read "wheresoever in New South Wales." It had been suggested, however, that the legislature could have legislated respecting offences committed outside the territorial limits of the colony. The judgment of the Committee (those present being Lords HALSBURY, L. C., WATSON, HOBHOUSE, and MACNAGHTEN, and Sir RICHARD COUCH) disposed of this contention as follows: "Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was thereby intended to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, *extra territorium jus dicenti impune non paretur*, would be applicable to such a case. Lord WENSLEYDALE, when Baron PARKE, advising the House of Lords in *Jefferys v. Boosey* (1855), 4 H. L. C. 815, 24 L. J. Ex. 81, 1 Jur. N. S. 615, expresses the same proposition in very terse language. He says: "The legislature has no power over any persons except its own subjects, — that is, persons natural-born subjects, or resident, or whilst they are within the territorial limits of the kingdom. The legislature can impose no duties except on them; and when legislating for the benefit of persons, must *primâ facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect. All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever."

It is enacted by the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 9: — "Where any murder or manslaughter shall have been committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty, in respect of any such case, whether the offence shall amount to the offence of murder or manslaughter, or of being accessory to murder or manslaughter, may be dealt with, . . . in any county

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or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act." This section embodies and extends the provision of the earlier statutes 33 Hen. VIII. c. 93, and 9 Geo. IV. c. 31, s. 7. The cases on the earlier statutes are *Reg. v. Surger* (1815), Russ. & Ry. 294, and *Reg. v. Azzopardi* (1843), 2 Moo. C. C. 288, 1 C. & K. 203, 6 State Tr. N. S. 21. In *Reg. v. Bernard* (1858), 1 F. & F. 240, the prisoner was indicted under the statute of George, as accessory before the fact to the murder of a policeman killed in Paris in Orsini's attempt to murder Napoleon III. The jury acquitted the prisoner, so that the points of law raised were left undetermined.

The criminal liability of a colonial governor is provided for by the Act 11 & 12 W. III. c. 12, which enacts that any oppressions of His Majesty's subjects or any other crime or offence committed by any "governor, lieutenant governor, deputy governor, or commander-in-chief of any plantation or colony within His Majesty's dominions" shall be inquired of, heard, and determined in the King's Bench, or by special commission. The Act is extended by 42 Geo. III. c. 85, to crimes and offences committed abroad by persons who hold or have held any public employment under the Crown. In *Reg. v. Shawe* (1816), 5 M. & S. 403, 17 R. R. 370, it was held that these Acts did not apply to felonies.

In *Reg. v. Eyre* (1868), L. R., 3 Q. B. 487, 37 L. J. M. C. 159, 18 L. T. 511, 16 W. R. 754, 9 B. & S. 329, it was decided that where a crime was alleged to have been committed by an ex-governor in his colony, a justice of the peace within whose jurisdiction the accused had come has jurisdiction (under the Act of 11 & 12 W. III.) to hear the case, and to commit upon the charge; and that if the accused is committed the depositions must be returned into the Queen's Bench. A *mandamus* having been issued by the Queen's Bench requiring the magistrate to hear the case, it was heard accordingly and the accused committed. In the event an indictment upon the charge was thrown out by the Grand Jury.

There are similar provisions relating to persons holding or having held public employment in the East Indies in 10 Geo. III. c. 47, s. 4, and 13 Geo. III. c. 63, s. 39.

*Reg. v. Picton* (1804), 30 State Tr. 225, was a trial of a governor of Trinidad for a misdemeanour alleged to have been committed by in-

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licting torture to extort a confession. The question was raised whether he was excused by reason of torture having been permitted by Spanish law at the time of the cession of the colony. Judgment had not been pronounced when General Picton was killed at Waterloo.

Criminals are now surrendered for trial in the countries in which the offence was committed, under the provisions of two statutes; if the crime has been committed in any part of the British dominions, under the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 52); if elsewhere, under the Extradition Act, 1870, the matters dealt with by the latter Act belong rather to the question of extradition, than to criminal law.

The act of the prisoner in the principal case was an offence against French law, as well as English law. It sometimes happens that the act although punishable in two countries is punishable in them upon different grounds. Of this character was the case of *Rex v. Peltier*, (1803), 28 How. St. Tr. 529, where the prisoner was indicted for a libel on Napoleon Bonaparte when First Consul. The libel, as a libel, might not perhaps be punishable here, but the tendency to create discord between the rulers and people of England and France was treated as the gist of the offence. So in 1881 Herr Most, the editor of the "Freiheit," was indicted at the Old Bailey for an article expressing his approval of the murder of the Tzar Alexander.

The ruling case again affirms the principle that a person need not be a natural born subject of the country in which he is brought to trial. This principle has been acted upon in England for centuries. Many cases will be found in Howell's State Trials in which an objection on the ground that the prisoner was not a natural born English subject was overruled. A long string of these authorities was cited in argument upon the trial of the *Duke of Hamilton*, the first year of the Commonwealth: 4 How. St. Tr. 1155. Among the cases there cited is that of *William Wallace*, executed 34 Ed. I for high treason. One ground upon which the conviction proceeded appears to have been that the moment Wallace crossed the border he became subject to English law, being in English territory, and owed the English king allegiance; having an armed band with him for the purpose of making war upon England he was levying war against the king, an overt act of treason. But the grounds of such proceedings in the time of Edw. I. are somewhat obscured by the claim of paramount sovereignty. In the later case of *Rex v. De La Motte* (1781), 21 How. St. Tr. 687, the prisoner was convicted and executed for sending to the French authorities particulars relating to the English fleet, the two countries being then at war. It was put forward as the ground of jurisdiction that, although the prisoner was a natural born Frenchman, he owed allegiance to this country by having been permitted to remain here under the protection of our laws.

## AMERICAN NOTES.

Mr. Bishop approves this doctrine, citing the principal case, 1 Criminal Law, sects. 117, 118, observing that if the vessel is private all on board are subject to the laws of the foreign country, "but it does not follow that they are not also subject to their own laws, criminal and civil." "On the high seas as well as in foreign ports or on tidal rivers, vessels are deemed to be floating parts of the territory of the several countries to which they respectively belong." The doctrine was applied in *United States v. Gordon*, 5 Blatchford (U. S. Circ. Ct.), 18, in the case of a crime committed on an American vessel in a river and arm of the sea on the coast of Africa, but the offender was a citizen of the United States. So in *United States v. Bennett*, 3 Hughes (U. S. Circ. Ct.), 466. A very learned review of the general subject may be found in *People v. Tyler*, 7 Michigan, 161.

In *United States v. Davis*, 2 Sumner (U. S. Circ. Ct.), 482, a gun was fired from an American ship, lying in the harbor of Raiatea, one of the Society Islands, and killed a person on a schooner in the same harbor belonging to one of the natives. It was held by STORY, J., that the act was in legal contemplation done on the foreign schooner, and that jurisdiction belonged exclusively to the foreign government, and not to the United States, under the Crimes Act of 1790.

Mr. Brown cites the principal case (Jurisdiction, sect. 86), observing: "The rule should be, we will punish all who offend against our sovereignty, if we can obtain control of the offender, without any regard to the nationality or the place of the offence; and in this view alone rests true national protection."

A vessel lying in an open roadstead of a foreign country is held to be on the high seas. *United States v. Pirates*, 5 Wheaton (U. S. Sup. Ct.), 184; *United States v. Gordon*, 5 Blatchford (U. S. Circ. Ct.), 18. So of a vessel in a harbor, fastened to the shore with a cable, and communicating with the shore only by boats. *United States v. Seagrist*, 4 Blatchford, 420. The United States Courts take cognizance of an offence committed on a foreign vessel by a citizen of the United States, or by a foreigner on a United States vessel, or by a citizen or foreigner on a piratical vessel. *United States v. Pirates*, *supra*; *Ex parte Bollman*, 1 Cranch (U. S. Circ. Ct.), 373; *United States v. Kessler*, 1 Baldwin (U. S. Circ. Ct.), 20.

SECTION II. — *Mens rea.*

## No. 2. — REG. v. TOLSON.

(C. C. R. 1889.)

## RULE.

IN general a criminal intention in the act charged is essential to make the act a crime. Therefore upon an indictment for bigamy, the finding of the jury that at the time of a second marriage the prisoner, in good faith and on reasonable grounds, believed her husband to be dead, amounts to an acquittal.

**Reg. v. Tolson.**

23 Q. B. D. 168–203 (s. c. 58 L. J. M. C. 97; 60 L. T. 899; 37 W. R. 716;  
16 Cox C. C. 629).

[168]

*Criminal Law. — Bigamy. — Mens rea.*

The prisoner was convicted under 24 & 25 Vict. c. 100, s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead:—

*Held*, by Lord COLERIDGE, C. J., HAWKINS, STEPHEN, CAVE, DAY, A. L. SMITH, WILLS, GRANTHAM, and CHARLES, JJ. (DENMAN, FIELD, and MANISTY, J.J., and POLLOCK and HUDDLESTON, BB., dissenting), that a *bonâ fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong.

Case stated by STEPHEN, J., and reserved by the Court for the consideration of all the Judges.

At the summer assizes at Carlisle in 1888 the prisoner Martha Ann Tolson was convicted of bigamy.

It appeared that the marriage of the prisoner to Tolson took place on September 11, 1880; that Tolson deserted her on [\* 169] \* December 13, 1881; and that she and her father made inquiries about him and learned from his elder brother and from general report that he had been lost in a vessel bound



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for America, which went down with all hands on board. On January 10, 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony was in no way concealed. In December, 1887, Tolson returned from America.

STEPHEN, J., directed the jury that a belief in good faith and on reasonable grounds that the husband of the prisoner was dead would not be a defence to a charge of bigamy, and stated in the case that his object in so holding was to obtain the decision of the Court in view of the conflicting decisions of single judges on the point. The jury convicted the prisoner, stating, however, in answer to a question put by the judge, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage, and the judge sentenced her to one day's imprisonment.

The question for the opinion of the Court was whether the direction was right. If the direction was right, the conviction was to be affirmed; if not, it was to be quashed.

1889. Jan. 26. A. Henry, for the prisoner.

No counsel appeared to argue on behalf of the Crown. [171]

*Cur. adv. vult.*

Of the judgments delivered by the judges, it is sufficient to reproduce the following:—

1889, May 11. WILLS, J. In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death, which the jury found that she upon reasonable grounds believed to be true. A few months after the second marriage he reappeared. The statute upon which the indictment was framed is the 24 & 25 Vict. c. 100, s. 57, which is in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labour for not more than two years," with a proviso that "nothing in this Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past,

and shall not have been known by such person to be living within that time."

There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past.

It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed [\* 172] if the mind of the person doing the act in question be innocent. "It is a principle of natural justice and of our law," says Lord KENYON, C. J., "that *actus non facit reum, nisi mens sit rea*. The intent and act must both concur to constitute the crime." *Fowler v. Padgett*, 7 T. R. 509, 514, 4 R. R. 511. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute -- fornication or seduction, for instance -- which, nevertheless, no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance, and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice and, indeed, the foundations of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

Although *prima facie*, and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been

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any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes \* an offence and is a criminal matter. In such [\* 173] cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had *bonâ fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference, for instance, in the kind of language used by Acts of Parliament which made the unauthorized possession of Government stores a crime, and the language used in bye-laws which say that if a man builds a house or a wall so as to encroach upon a space protected by the bye-law from building he shall be liable to a penalty. Yet in *Reg. v. Sleep*, L. & C. 44; 30 L. J. M. C. 170, it was held that a person in possession of Government stores with the broad arrow could not be convicted when there was not sufficient evidence to show that he knew they were so marked; whilst the mere infringement of a building bye-law would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from the pavement in front of his house before a given hour in the morning, and if he fail to do so shall pay a penalty; and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet I suppose that in the first case the penalty would attach if the thing were not done, whilst in the other case it has been held

in *Hearne v. Garton*, 2 E. & E. 66, 28 L. J. M. C. 216, that where the sender had made reasonable inquiry and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had, in fact, sent the vitriol not properly marked. There is no difference between the [\*174] language \* by which it is enacted that "whosoever shall unlawfully and wilfully kill any pigeon under such circumstances as shall not amount to a larceny at common law" shall be liable to a penalty, and the language by which it is enacted that "if any person shall commit any trespass by entering any land in the daytime in pursuit of game" he shall be liable to a penalty; and yet in the first case it has been held that his state of mind is material, *Taylor v. Newman*, 4 B. & S. 89, 32 L. J. M. C. 189; in the second that it is immaterial. *Watkins v. Major*, L. R., 10 C. P. 662, 44 L. J. M. C. 164. So, again, there is no difference in language between the enactments I have referred to in which the absence of a guilty mind was held to be a defence, and that of the statute which says that "any person who shall receive two or more lunatics" into any unlicensed house shall be guilty of a misdemeanour, under which the contrary has been held. *Reg. v. Bishop*, 5 Q. B. D. 259, 49 L. J. M. C. 45. A statute provided that any clerk to justices who should, under colour and pretence of anything done by the justice or the clerk, receive a fee greater than that provided for by a certain table, should for every such offence forfeit £20. It was held that where a clerk to justices *bonâ fide* and reasonably but erroneously believed that there were two sureties bound in a recognizance beside the principal, and accordingly took a fee as for three recognizances when he was only entitled to charge for two, no action would lie for the penalty. "*Actus*," says Lord CAMPBELL, "*non facit reum, nisi mens sit rea*. Here the defendant very reasonably believing that there were two sureties bound, beside the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is 'for every such offence.' If, therefore, the table allowed him to charge for three recognizances where there are a principal and two sureties, he has not committed an offence under the Act." *Bowman v. Blyth*, 7 E. & B. 26, 43, 26 L. J. M. C. 57.

If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is



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and sometimes that there is not an offence when the guilty mind is absent, it is obvious that assistance must be sought *aliunde*, and that all circumstances must be taken into consideration \* which tend to show that the one construction or [\*175] the other is reasonable, and amongst such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight if the words be incapable of more than one construction; but I have, I think, abundantly shown that there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken into account. In a case in which a woman was indicted under 9 & 10 Wm. III, c. 41, s. 2, for having in her possession without a certificate from the proper authority Government stores marked in the manner described in the Act, it was argued that by the Act the possession of the certificate was made the sole excuse, and that as she had no certificate she must be convicted. FOSTER, J., said, however, that though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration; otherwise a law calculated for wise purposes might be made a handmaid to oppression, and directed the jury that if they thought the defendant came into possession of the stores without any fraud or misbehaviour on her part they ought to acquit her. Foster's Crown Law, 3d ed. App. pp. 439, 440. This ruling was adopted by Lord KENYON in *Reg. v. Banks*, 1 Esp. 144, 5 R. R. 726, who considered it beyond question that the defendant might excuse himself by showing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof and making it necessary for the defendant to show matter of excuse, and to negative the guilty mind, instead of its being necessary for the Crown to show the existence of the guilty mind. *Primâ facie* the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned. Suppose a man had taken up



by mistake one of two baskets exactly alike and of [\* 176] similar weight, one of which contained \*innocent articles belonging to himself and the other marked Government stores, and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defence could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute? In *Fowler v. Padget*, 7 T. R. 509, 4 R. R. 511, the question was whether it was an act of bankruptcy for a man to depart from his dwelling-house whereby his creditors were defeated and delayed although he had no intention of defeating and delaying them. The statute which constituted the act of bankruptcy was 1 Jac. I., c. 15, which makes it an act of bankruptcy (amongst other things) for a man to depart his dwelling-house "to the intent *or* whereby his creditors may be defeated and delayed." The Court of King's Bench, consisting of Lord KENYON C. J., and ASHURST and GROSE, JJ., held that there was no act of bankruptcy. "Bankruptcy," said Lord KENYON, "is considered as a crime, and the bankrupt in the old laws is called an offender; but," he adds in the passage already cited, "it is a principle of natural justice and of our law that *actus non facit reum, nisi mens sit rea*," and the Court went so far as to read "and" in the statute in place of "or" which is the word used in the Act, in order to avoid the consequences which appeared to them unjust and unreasonable. In *Ree v. Banks*, 1 Esp. 144, 5 R. R. 726, above cited, Lord KENYON referred to FOSTER, J.,'s ruling in this case as that of "one of the best Crown lawyers that ever sat in Westminster Hall." These decisions of FOSTER, J., and Lord KENYON have been repeatedly acted upon: see *Reg. v. Willmott*, 3 Cox, C. C. 281; *Reg. v. Cohen*, 8 Cox, C. C. 41; *Reg. v. Sheep* (in the Court for C. C. R.), L. & C. 44, 30 L. J. M. C. 170; *Reg. v. O'Brien*, 15 L. T. N. S. 419.

Now in the present instance one consequence of holding that the offence is complete if the husband or wife is *de facto* alive at the time of the second marriage, although the defendant had at the time of the second marriage every reason to believe the contrary, would be that though the evidence of death should be sufficient to induce the Court of Probate to grant probate of [\* 177] the will or \*administration of the goods of the man sup-

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posed to be dead, or to prevail with the jury upon an action by the heir to recover possession of his real property, the wife of the person supposed to be dead who had married six years and eleven months after the last time that she had known him to be alive would be guilty of felony in case he should turn up twenty years afterwards. It would be scarcely less unreasonable to enact that those who had in the mean time distributed his personal estate should be guilty of larceny. It seems to me to be a case to which it would not be improper to apply the language of Lord KENYON, when dealing with a statute which literally interpreted led to what he considered an equally preposterous result, "I would adopt any construction of the statute that the words will bear in order to avoid such monstrous consequences." *Fowler v. Pudget*, 7 T. R. 509, 514, 4 R. R. 511, 513.

Again, the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the Act of 24 & 25 Vict., to the loss of civil rights, to imprisonment with hard labour, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law. I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great: but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. It is, as it seems to me, undesirable in the highest degree without \* necessity to multiply instances in which people shall be [\* 178] liable to conviction upon very grave charges when the circumstances are such that no judge in the kingdom would think of pronouncing more than a nominal sentence.

It is said, however, in respect of the offence now under discussion, that the proviso in 24 & 25 Vict. c. 100, s. 57, that "nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for seven years last past, and shall not have been known by such person to be living within that time," points out the sole excuse of which the Act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party without any further inquiry from criminal liability; and I think it is an argument of considerable weight, in this connection, that under 9 & 10 Wm. III. c. 41, s. 2, where a similar contention was founded upon the specification of one particular circumstance under which the possession of Government stores should be justified, successive Judges and Courts have refused to accede to the reasoning, and have treated it, to use the words of Lord KENYON, as a matter that "could not bear a question" that the defendant might show in other ways that his possession was without fraud or misbehaviour on his part. *Reg. v. Banks.*

Upon the point in question there are conflicting decisions. It was held by MARTIN, B., in *Reg. v. Turner*, 9 Cox, C. C. 145, and by CLEASBY, B., in *Reg. v. Horton*, 11 Cox, C. C. 670, that *bonâ fide* belief, at the time of the second marriage, upon reasonable grounds, that the first husband or wife was dead, was a defence. In *Reg. v. Gibbons*, 12 Cox, C. C. 237, it is said that it was held by BRETT, J., after consulting WILLES, J., that such a belief was no defence. The report, however, is most unsatisfactory, as, if the facts were as there stated, there was no reasonable evidence of such belief upon any reasonable grounds, and in *Reg. v. Prince*, L. R., 2 C. C. R. 154, 44 L. J. M. C. 126, BRETT, J., gave a very elaborate judgment containing his matured [\* 179] and considered opinion upon a \* similar question, which it is quite impossible to reconcile with the supposed ruling in *Reg. v. Gibbons*.

In *Reg. v. Bennett*, 14 Cox, C. C. 45, BRAMWELL, L. J., is reported to have followed *Reg. v. Gibbons*, and to have said that he had always refused to act upon *Reg. v. Turner*. But here again the report is eminently unsatisfactory, for it proceeds to state that the prisoner was convicted of two other offences, forgery

and obtaining money by false pretences, and sentenced to ten years' penal servitude, which is a greater sentence than he could have received for bigamy. Except for the purpose of bringing out the sort of man that the prisoner was, and so emphasizing the fact that he deserved condign punishment, the bigamy trial might have been omitted.

In *Reg. v. Moore*, 13 Cox, C. C. 544, DENMAN, J., after consultation with AMPHLETT, L. J., directed the acquittal of a woman charged with bigamy, the jury having found that although seven years had not elapsed since she last knew that her husband was living, she had when she married a second time a reasonable and *bonâ fide* belief that he was dead, saying that in his opinion and that of AMPHLETT, L. J., such belief was a defence. He added, however, that his opinion was not to be taken as a final one, and that, had the circumstances been such that the prisoner would, if the conviction could be sustained, have deserved a substantial sentence, he should have directed a conviction, and reserved the question.

There is nothing, therefore, in the state of the authorities directly bearing upon the question to prevent one from deciding it upon the grounds of principle. It is suggested, however, that the important decision of the Court of fifteen Judges in *Reg. v. Prince* is an authority in favour of a conviction in this case. I do not think so. In *Reg. v. Prince* the prisoner was indicted under 24 & 25 Vict. c. 100, s. 55, for "unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father." The jury found that the prisoner *bonâ fide* believed upon reasonable \* grounds that she was eighteen. The Court (*dissentiente* [\*180] BRETT, J.) upheld the conviction. Two judgments were delivered by a majority of the Court in each of which several Judges concurred, whilst three of them, DENMAN, J., POLLOCK, B., and QUAIN, J., concurred in both. The first of the two, being the judgment of nine Judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the Legislature was that if a man took an unmarried girl under sixteen out of the possession of her father against his will, he must take his chance of whether any belief he might have about her age was



right or wrong, and if he made a mistake upon this point so much the worse for him; he must bear the consequences. The second of the two judgments, being that of seven Judges gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the Legislature as illustrated by other associated sections of the same Act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind," as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then, in taking her out of the possession of the father against his will was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the *mens rea*."

The case of *Reg. v. Prince*, therefore, is a direct and cogent authority for saying that the intention of the Legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion.

In my opinion, therefore, this conviction ought to be quashed. My brother CHARLES authorizes me to say that this judgment expresses his views as well as my own.

[181] CAVE, J., arrived at the same conclusion, in a judgment in which DAY and A. L. SMITH, JJ. concurred.

[184] STEPHEN, J. The cases were both reserved by me, *Reg. v. Tolson*, on a trial which took place at Carlisle on the summer circuit of 1888, and *Reg. v. Stryppe*, on a trial which took place in December last at Winchester in the autumn circuit of 1888.<sup>1</sup> In each case precisely the same [\* 185] point arose. In each the prisoner, a woman, was indicted for bigamy. In each case the prisoner lost sight of her husband who deserted her, and in each case she was informed that he was dead and believed the information, as the jury expressly found, in good faith and on reasonable grounds. In

<sup>1</sup> It is unnecessary in this report to give the decision in which followed that in the further allude to the case of *Reg. v. Stryppe*, present case.



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each case the second ceremony of marriage was performed within the term of seven years after the husband and wife separated.

For the purpose of settling a question which had been debated for a considerable time, and on which I thought the decisions were conflicting, and not as the expression of my own opinion, I directed the jury that a belief in good faith and on reasonable grounds in the death of one party to a marriage was not a defence to the charge of bigamy against the other who married again within the seven years. In each case I passed a nominal sentence on the person convicted, and I stated, for the decision of this Court, cases which reserved the question whether my decision was right or wrong. I am of opinion that each conviction should be quashed, as the direction I gave was wrong, and that I ought to have told the jury that the defence raised for each prisoner was valid. My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase *non est reus, nisi mens sit rea*. Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea*, or guilty mind. The expression again [\*186] is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime. It will, I think, be found that much of the discussion of the law of libel in *Shipley's Case*, 4 Doug. 73; 21 St. Tr. 847, proceeds upon a more or less

distinct belief to this effect. It is a topic frequently insisted upon in reference to political offences, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents.

Like most legal Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. It is not one of the "regulæ juris" in the Digest. The earliest case of its use which I have found is in the "Leges Henrici Primi," v. 28, in which it is said: "Si quis per coaccionem abjurare cogatur quod per multos annos quiete tenuerit, non in jurante set cogente perjurium erit. Reum non facit nisi mens rea." In Broom's Maxims the earliest authority cited for its use is 3d Institute, ch. i., fo. 10. In this place it is contained in a marginal note, which says that when it was found that some of Sir John Oldcastle's adherents took part in an insurrection "pro timore mortis et quod recesserunt quam cito potuerunt," the Judges held that this was to be adjudged no treason, because it was for fear of death. Coke adds: "Et actus non facit reum, nisi mens sit rea." This is only Coke's own remark, and not part of the judgment. Now Coke's scraps of Latin in this and the following chapters are sometimes contradictory. Notwithstanding the passage just quoted, he says in the margin of his remarks on opinions delivered in Parliament by Thyrning and others in the 21st R. II.: "Melius est omnia mala pati quam malo consentire" (22, 23), which would show that Sir J. Oldcastle's associates had a *mens rea*, or guilty mind, though they were threatened with death, and thus contradicts the passage first quoted.

[\* 187] \* It is singular that in each of these instances the maxim should be used inconnection with the law relating to coercion.

The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime

is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly;" but it is the general — I might, I think, say, the invariable — practice of the Legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality; but I do not believe they are ever introduced into any statute by which any particular crime is defined.

The meanings of the words "malice," "negligence," and "fraud" in relation to particular crimes has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence.

With regard to knowledge of fact, the law, perhaps, is not quite so clear; but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. *Leret's Case*, 1 Hale, 474, decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar \* to be, killed a person who was not a [\* 188] burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the Judges in *Macnaghten's Case*, 10 C. & F. 200, it is stated that if under an insane delusion one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bonâ*

*fact* claim of right excuses larceny, and many of the offences against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: a constable, reasonably believing a man to have committed murder, is justified in killing him to prevent his escape; but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the cases reserved fall under the general rule as to mistakes of fact, and that the convictions ought to be quashed.

I will now proceed to deal with the arguments which are supposed to lead to the opposite result.

It is said, first, that the words of 24 & 25 Vict. c. 100, s. 57, are absolute, and that the exceptions which that section [\*189] contains are the only ones which are intended to be admitted, and this it is said is confirmed by the express proviso in the section, — an indication which is thought to negative any tacit exception. It is also supposed that the case of *Reg. v. Prince*, L. R., 2 C. C. R. 154, 44 L. J. M. C. 126, decided on s. 55, confirms this view. I will begin by saying how far I agree with these views. First, I agree that the case turns exclusively upon the construction of s. 57 of 24 & 25 Vict. c. 100. Much was said to us in argument on the old statute, 1 Jac. I. c. 11. I cannot see what this has to do with the matter. Of course, it would be competent to the Legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

In the first place I will observe upon the absolute character of



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the section. It appears to me to resemble most of the enactments contained in the Consolidation Acts of 1861, in passing over the general mental elements of crime which are presupposed in every case. Age, sanity, and more or less freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words wilfully and maliciously, or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes; but there are some cases in which this cannot be said. Such are *s. 55*, on which *Reg. v. Prince* was decided, *s. 56*, which punishes the stealing of "any child under the age of fourteen years," *s. 49*, as to procuring the defilement of any "woman or girl under the age of twenty-one," in each of which the same question might arise as in *Reg. v. Prince*; to these I may add some of the provisions of the Criminal Law Amendment Act of 1885. Reasonable belief that a girl is sixteen or upwards is a defence to the charge of an offence under *ss. 5, 6 and 7*, but this is not provided for as to an offence against *s. 4*, which is meant to protect girls under thirteen.

It seems to me that as to the construction of all these sections the case of *Reg. v. Prince* is a direct authority. It was the case \* of a man who abducted a girl under sixteen, [\*190] believing, on good grounds, that she was above that age. Lord Esher, then Brett, J., was against the conviction. His judgment establishes at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows: "That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England."

Lord Blackburn, with whom nine other Judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the Legislature intended to be done at the peril of the person who did them, but not all.



The judgment delivered by Lord BLACKBURN proceeds upon the principle that the intention of the Legislature in s. 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse."

Lord BRAMWELL's judgment proceeds upon this principle: "The Legislature has enacted that if any one does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had her father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in any one's possession nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute."

All the Judges therefore in *Reg. v. Prince* agreed on the general principle, though they all, except Lord ESHER, considered that the object of the Legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrongdoer should act at his peril.

As another illustration of the same principle, I may [\*191] refer \* to *Reg. v. Bishop*, 5 Q. B. D. 259, 49 L. J. M. C.

45. The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 & 9 Vict. c. 100, s. 44. It was proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds, that they were not lunatics. I held that this was immaterial, having regard to the scope of the Act, and the object for which it was apparently passed, and this Court upheld that ruling.

The application of this to the present case appears to me to be as follows. The general principle is clearly in favour of the prisoners: but how does the intention of the Legislature appear to have been against them? It could not be the object of Parliament to treat the marriage of widows as an act to be, if possible, prevented as presumably immoral. The conduct of the women convicted was not in the smallest degree immoral; it was perfectly natural and legitimate. Assuming the facts to be as they supposed, the infliction of more than a nominal punishment on them would have been a scandal. Why, then, should the Legislature be held to have wished to subject them to punishment at all.

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If such a punishment is legal, the following amongst many other cases might occur. A number of men in a mine are killed, and their bodies are disfigured and mutilated, by an explosion; one of the survivors secretly absconds, and it is supposed that one of the disfigured bodies is his. His wife sees his supposed remains buried; she marries again. I cannot believe that it can have been the intention of the Legislature to make such a woman a criminal; the contracting of an invalid marriage is quite misfortune enough. It appears to me that every argument which showed in the opinion of the Judges in *Reg. v. Prince* that the Legislature meant seducers and abductors to act at their peril, shows that the Legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honourable marriage, with a liability to seven years' penal servitude.

It is argued that the proviso that a re-marriage after seven years' separation shall not be punishable, operates as a tacit \*exclusion of all other exceptions to the penal part of [\* 192] the section. It appears to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to show not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time. It would to my mind be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of recovering a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger. It remains only to consider cases upon this point decided by single Judges. As far as I know there are reported the following cases:—

*Reg. v. Turner* (1862), 9 Cox, C. C. 145. In this case MARTIN, B., is reported to have said: "In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness. Still the jury are to say if upon such testimony she had an honest belief that her first husband was dead."

In *Reg. v. Horton* (1871), 11 Cox, C. C. 670, CLEASBY, B.,  
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directed the jury that if the prisoner reasonably believed his wife to be dead he was entitled to be acquitted. He was convicted.

In *Reg. v. Gibbons* (1872) 12 Cox. C. C. 237, BRETT, J., after consulting WILLES, J., said: "*Bonâ fide* belief as to the husband's death was no defence unless the seven years had elapsed," and he refused to reserve a case, a decision which I cannot reconcile with his judgment three years afterwards in *Reg. v. Prince*, L. R., 2 C. C. R. 154, 44 L. J. M. C. 126. In *Reg. v. Moore* (1877), 13 Cox. C. C. 544, DENMAN, J., after consulting AMPHLETT, L. J., held that a *bonâ fide* and reasonable belief in a husband's death excused a woman charged with bigamy. In *Reg. v. Bennett* (1877), 14 Cox. C. C. 45, Lord BRAMWELL agreed with the decision in *Reg. v. Gibbons*.

The result is that the decisions in *Reg. v. Gibbons* and *Reg. v. Bennett* conflict with those of *Reg. v. Turner*, *Reg. v. Horton* [\* 193] and *Reg. v. Moore*. I think, therefore, that these \* five decisions throw little light on the subject. The conflict between them was in fact the reason why I reserved the cases.

My brother GRANTHAM authorizes me to say that he concurs in this judgment.

HAWKINS, J., delivered a separate judgment. He was of opinion that the conviction ought to be reversed.

[196] MANISTY, J. I am of opinion that the conviction should be affirmed.

The question is whether if a married woman marries another man during the life of her former husband and within seven years of his leaving her she is guilty of felony, the jury having found as a fact that she had reason to believe and did honestly believe that her former husband was dead.

The 57th section of the 24 & 25 Vict. c. 100, is as express and as free from ambiguity as words can make it. The statute says, "Whosoever being married shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony, and being convicted, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour." The statute does not even say if the accused shall feloniously or unlawfully or knowingly commit the act he or she shall be guilty of felony; but the enactment is couched in the clearest

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language that could be used to prohibit the act and to make it a felony if the act is committed.

If any doubt could be entertained on the point it seems to me the proviso which follows the enactment ought to remove it. The proviso is that "nothing in the 57th section of the Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time."

Such being the plain language of the Act, it is, in my opinion, the imperative duty of the Court to give effect to it, and to leave it to the Legislature to alter the law if it thinks it ought to be altered.

\* Probably if the law was altered some provision would [\*197] be made in favour of children of the second marriage. If the second marriage is to be deemed to be legal for one purpose, surely it ought to be deemed legal as to the children who are the offspring of it. If it be within the province of the Court to consider the reasons which induced the Legislature to pass the Act as it is, it seems to me one principal reason is on the surface; namely, the consequence of a married person marrying again in the lifetime of his or her former wife or husband, in which case it might and in many cases would be that several children of the second marriage would be born and all would be bastards. The proviso is evidently founded upon the assumption that after the lapse of seven years and the former husband or wife not being heard of, it may reasonably be inferred that he or she is dead, and thus the mischief of a second marriage in the lifetime of the former husband or wife is to a great extent, if not altogether, avoided.

It is to be borne in mind that bigamy never was a crime at common law. It has been the subject of several Acts of Parliament, and is now governed by 24 & 25 Viet. c. 100, s. 57.

No doubt in construing a statute the intention of the Legislature is what the Court has to ascertain; but the intention must be collected from the language used, and where that language is plain and explicit and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of Judges to give effect to it.

The cases of insanity, &c., on which reliance is placed stand on



a totally different principle; viz., that of an absence of *mens*. Ignorance of the law is no excuse for the violation of it, and if a person choose to run the risk of committing a felony, he or she must take the consequences if it turn out that a felony has been committed.

Great stress is laid by those who hold that the conviction should be quashed upon the circumstance that the crime of bigamy is by the statute declared to be a felony and punishable with penal servitude or imprisonment with or without hard labour for any term not exceeding two years. If the crime had been declared to

be a misdemeanour punishable with fine or imprisonment, [198] surely the construction of the statute would have \* been, or ought to have been, the same. It may well be that the Legislature declared it to be a felony to deter married persons from running the risk of committing the crime of bigamy, and in order that a severe punishment might be inflicted in cases where there were no mitigating circumstances. No doubt circumstances may and do affect the sentence, even to the extent of the punishment being nominal, as it was in the present case; but that is a very different thing from disregarding and contravening the plain words of the Act of Parliament.

The case is put by some of my learned Brothers of a married man leaving his wife and going into a foreign country intending to settle there, and it may be afterwards to send for his wife and children, and the ship in which he goes is lost in a storm with, as is supposed, all on board, and after the lapse of say a year, and no tidings received of any one having been saved, the underwriters pay the insurance on the ship, and the supposed widow gets probate of her husband's will and marries and has children, and after the lapse of several years the husband appears, it may be a few days before seven years have expired, and the question is asked, would it not be shocking that in such a case the wife could be found guilty of bigamy?

My answer is that the Act of Parliament says in clear and express words, for very good reasons as I have already pointed out, that she is guilty of bigamy. The only shocking fact would be that some one for some purpose of his own had instituted the prosecution. I need not say that no public prosecutor would ever think of doing so, and the Judge before whom the case came on for trial would, as my brother STEPHEN did in the present case,



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pass a nominal sentence of a day's imprisonment (which in effect is immediate discharge), accompanied, if I were the Judge, with a disallowance of the costs of the prosecution. It may be said, but the woman is put to some trouble and expense in appearing before the magistrate, who would of course take nominal bail, and in appearing to take her trial. Be it so, but such a case would be very rare indeed. On the other hand, see what a door would be opened to collusion and mischief if, in the vast number of cases where men in humble life leave their wives and go abroad, it would be a good defence for a woman to say and \*give proof, which the jury believed, that she had been [\*199] informed by some person upon whom she honestly thought she had reason to rely, and did believe, that her husband was dead, whereas in fact she had been imposed upon and her husband was alive.

What operates strongly on my mind is this, that if the Legislature intended to prohibit a second marriage in the lifetime of a former husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the 57th section of the Act in question. In this view I am fortified by several sections of the same Act, where the words "unlawfully" and "maliciously and unlawfully" are used (as in s. 23), and by a comparison of them with the section in question (s. 57), where no such words are to be found. I especially rely upon the 55th section, by which it is enacted that "whosoever shall unlawfully [a word not used in s. 57] take or cause to be taken any unmarried girl being under the age of sixteen years out of the possession of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour." Fifteen out of sixteen Judges held in the case of *Reg. v. Prince*, L. R., 2 C. C. R. 154, 44 L. J. M. C. 126, that, notwithstanding the use of the word "unlawfully" the fact of the prisoner believing and having reason to believe that the girl was over sixteen afforded no defence. This decision is approved of upon the present occasion by five Judges, making in all twenty against the nine who are in favour of quashing the conviction. To the twenty I may, I think, fairly add TINDAL, C. J., in *Reg. v. Robins*, 1 C. & K. 456, and WILLES, J., in *Reg. v. Mycock*, 12 Cox, C. C. 28.

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I rely also very much upon the 5th section of the Act passed in 1885 for the better protection of women and girls (48 & 49 Vict. c. 69), by which it was enacted that "any person who unlawfully and carnally knows any girl above thirteen and under sixteen years shall be guilty of a misdemeanour:" but to that is added a proviso that "it shall be a sufficient defence if it be made to appear to the Court or jury before whom the charge shall be brought that the person charged had reasonable cause to [ 200 ] believe and did believe that the girl was of or above the age of sixteen." It is to be observed that notwithstanding the word "unlawfully" appears in this section it was considered necessary to add the proviso, without which it would have been no defence that the accused had reasonable cause to believe and did believe that the girl was of or above the age of sixteen. Those who hold that the conviction in the present case should be quashed really import into the 57th section of the 24 & 25 Vict. c. 100, the proviso which is in the 5th section of the 48 & 49 Vict. c. 69, contrary, as it seems to me, to the decision in *Reg. v. Prince*, and to the hitherto undisputed canons for construing a statute.

It is said that an indictment for the offence of bigamy commences by stating that the accused feloniously married, &c., and consequently the principle of *mens rea* is applicable. To this I answer that it is to the language of the Act of Parliament and not to that of the indictment the Court has to look. I consider the indictment would be perfectly good if it stated that the accused, being married, married again in the lifetime of his or her wife or husband contrary to the statute, and so was guilty of felony.

I am very sorry we had not the advantage of having the case argued by counsel on behalf of the Crown. My reason for abstaining from commenting upon the cases cited by Mr. Henry in his very able argument for the prisoner is because the difference of opinion among some of the Judges in those cases is as nothing compared with the solemn decision of fifteen out of sixteen Judges in the case of *Reg. v. Prince*. So far as I am aware, in none of the cases cited by my learned Brothers was the interest of third parties, such as the fact of there being children of the second marriage, involved. I have listened with attention to the judgments which have been delivered, and I have not heard a single observa-

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tion with reference to this, to my mind, important and essential point. I am absolutely unable to distinguish *Reg. v. Prince* from the present case, and, looking to the names of the eminent Judges who constituted the majority, and to the reasons given in their judgments, I am of opinion upon authority as well as principle that the conviction should be affirmed.

\* The only observation which I wish to make is (speak- [\* 201] ing for myself only), that I agree with my learned brother STEPHEN in thinking that the phrases *mens rea* and *non est reus nisi mens sit rea* are not of much practical value, and are not only "likely to mislead," but are "absolutely misleading." Whether they have had that effect in the present case on the one side or the other it is not for me to say.

I think the conviction should be affirmed. My brothers DENMAN, POLLOCK, FIELD, and HUDDLESTON agree with this judgment; but my brother DENMAN has written a short opinion of his own, with which my brother FIELD agrees. [This opinion is as follows:—

DENMAN, J. "Having done my best to form a correct judgment as to the real intention of the statute on which the question turns, I have come to the conclusion, notwithstanding the reasons which have been given to the contrary, that it was intended to provide, and does provide, that any person who marries another (his or her wife or husband, as the case may be, being at the time alive) does so at his or her peril; and can only make good a defence to a prosecution for bigamy by proving a continuous absence for seven years: and that even such an absence will not be a defence if the prosecution can prove knowledge on the part of the accused within seven years of the second marriage that the first wife or husband, as the case may be, was still alive. I am desired by my brother FIELD to add that he agrees in this view, but that he also agrees with me that it is not necessary to give any detailed reasons for dissenting from the judgment of the majority."]

Lord COLERIDGE, C. J., mentioned that, at the conclusion of the argument, he had been one of those who were unable to agree with the opinion of the majority; but, on considering the proviso, was able to find in it an implication that the proof of reasonable belief of death, although the seven years were not elapsed, would establish an offence.

*Conviction reversed.*

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The above rule must be read in connection with the next following rule, No. 3, p. 60, *post*. The effect of these two rules is stated by Lord MANSFIELD in *Ree v. Woodfall* (1770), 5 Burr. 2661. That was a criminal information for libel for printing and publishing the celebrated letters of Junius. The information had alleged that the act was done with a malicious and criminal intention, but the jury had found the defendant "guilty of the printing and publishing only." It was argued that the jury had by the use of the word "only" negated the malicious and criminal intention, but the Court held that it was not necessary in order to support the conviction to prove the intent. In delivering the judgment of the Court, Lord MANSFIELD said, "Where an act in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful, as in this case, the proof of justification or excuse lies on the defendant; and in failure thereof the law implies a criminal intent." This statement was adopted by Lord ELLENBOROUGH in *Ree v. Phillips* (1805), 6 East 464, 2 Smith 550, 8 R. R. 511. In that case the defendant was indicted for sending a challenge to fight a duel.

That guilt or innocence depends in general upon the intent with which an act is done is exemplified by another class of cases, namely, those where facilities have been given to the commission of the act in order that the guilt may be established. *Ree v. Egginton* (1801), 2 Leach Cr. C. 913, 2 Bos. & P. 508, 5 R. R. 689; *Ree v. Holden* (1810), 2 Taunt. 334, 11 R. R. 600. The extent to which the Court will go is seen by such a case as *Reg. v. Merthyr Tydfil (Justices)* March 19, 1894. Upon the hearing of a charge under section 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Viet. c. 69), for having unlawful connection with a girl under the age of sixteen, it appeared that the girl informed her mother that she was *enccinte* by the prisoner. By arrangement and acting on the mother's instructions, the girl brought the man to her parents' house, where he was caught in the act of connection by the mother. This the mother did for the purpose of obtaining sufficient evidence to ensure a conviction. Upon this an application was made to the magistrates for a summons against the mother, under section 6 of the same Act, which provides that any person, who being the owner or occupier of any premises, or having or acting in the management or control thereof, induces or knowingly suffers any girl between the age of thirteen and sixteen to resort to or be upon such premises, for the purpose of being unlawfully and carnally known by any man, shall be guilty of a misdemeanour. The magis-



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trates refused to allow the summons to issue, and an application was thereupon made for a *mandamus*, which the Court refused.

In some cases, as in the case of rape, the law has fixed an age below which the offence cannot be committed. The principle of these cases was recognized and applied in a case under the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69) s. 4, *Reg. v. Waite* (1892) 1892, 2 Q. B. 600, 61 L. J. M. C. 187, 67 L. T. 300, 41 W. R. 80. An infant under the age of seven years cannot be guilty of felony: 1 Hale P. C. 27. In Emlyn's edition of Hale a case is cited of a boy aged eight convicted and executed in the seventeenth century at Abingdon for a felony which consisted in firing two barns. In more modern times the rule has been stated in such a manner as to induce a jury to acquit. In *Reg. v. Owen* (1830), 4 C. & P. 236, a prisoner aged ten was indicted for feloniously stealing some coals. In his charge to the jury, LITTLEDALE, J., said: "Whenever a person committing a felony is under fourteen years of age the presumption of law is that he or she has not sufficient capacity to know that it is wrong; and such a person ought not to be convicted unless there be evidence to satisfy the jury that the party, at the time of the offence, had guilty knowledge that he or she was doing wrong."

Upon the ground that a child was evidently acting under the direction of adults, his acquittal was directed: *Reg. v. Boober* (1850), 4 Cox C. C. 272.

In the case of married women, the jury are always asked whether they acted under marital compulsion. And where a jury found that a wife had so acted, STEPHEN, J., directed an acquittal to be entered for her: *Reg. v. Dykes* (1885), 51 Cox 771.

The effect of insanity, as affecting responsibility in criminal matters, was the subject of a series of questions, propounded by the House of Lords to the Judges in *Macnaghten's Case* (H. L. 1840), 10 Cl. & Fin. 200, 8 Scott N. R. 595, 1 C. & K. 130, 4 State Tr. N. S. 849. The questions were propounded under a power of the House of Lords to require the opinions of the Judges upon abstract propositions of law. The points dealt with by the Judges were not argued, and there is great force in the protest of MAULE, J., against the practice. The views expressed by the Judges establish that the responsibility of an insane person must depend upon his power to distinguish between right and wrong. It is stated in the head note in *Clark & Finnelly* that a medical man, who has been in Court and heard the evidence, may be asked as a man of science, whether the facts stated by the witnesses, assuming them to be true, showed a state of mind incapable of distinguishing between right and wrong. The body of the report does not bear out that view, as TINDAL, CH. J., who delivered the opinion of all the



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Judges except MAULE, J., expressly qualified this statement, and said that a question of this character could not be put as a matter of right. In the later case of *Reg. v. Frances* (1849), 4 Cox C. C. 57, ALDERSON, B., and CRESSWELL, J., refused to allow a similar course to be pursued, and held that the proper mode of examination was to ask a witness what were the signs of insanity, or to take particular facts, and to ask the witness, on the assumption that these facts were true, whether in his judgment they were indicative of insanity at the time the alleged offence was committed. "Persons *primâ facie* must be taken to be of sound mind until the contrary is shown." *Per Lord DENMAN*, Ch. J., *Reg. v. Oxford* (1840), 9 C. & P. 525, 546, 4 State Tr. N. S. 497, a trial at bar.

The legislative provisions relating to criminal lunatics are now contained in 39 & 40 Geo. III. c. 94. s. 3; 1 & 2 Vict. c. 2; 23 & 24 Vict. c. 75; 46 & 47 Vict. c. 38; and 47 & 48 Vict. c. 64.

Drunkenness, although sometimes taken into consideration in fixing the punishment, is no excuse to the commission of an offence; but *delirium tremens*, caused by drunkenness, if it produces such a degree of madness as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility. *Reg. v. Davis* (1881), 14 Cox C. C. 563, *per* STEPHEN, J.

In *Reg. v. Dyson* (1894) 1894, 2 Q. B. 176, 63 L. J. M. C. 124, 70 L. T. 877, 42 W. R. 526, the Court held that an undischarged bankrupt, who obtained credit for a sum of £20 and upwards without disclosing his position, was liable to be convicted, although the jury negatived any intention to defraud. This was on the wording of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31, which created the offence. It is on similar grounds that BRETT, M. R., in *Attorney-General v. Bradlaugh* (C. A. 1885), 14 Q. B. D. 667, 54 L. J. Q. B. 205, 52 L. T. 589, 33 W. R. 673, sought to explain the decision in *Reg. v. Prince*, which is referred to and distinguished in the principal case.

*Reg. v. Tyrrell* (1893) 1894, 1 Q. B. 710, 63 L. J. M. C. 58, 70 L. T. 41, 42, W. R. 255, 17 Cox C. C. 716, raised a question somewhat analogous to the rule. The prisoner, a girl between thirteen and sixteen years of age, was indicted for having aided and abetted, counselled and procured the commission by a man of the misdemeanour of having unlawful carnal knowledge of her contrary to the form of the statute, and also for having solicited and incited him to commit the same offence. The Court came to the conclusion that the statute, the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), was designed with the object of protecting women and girls against themselves, and that no offence had been committed.

Questions of excusable or justifiable homicide are nearly akin to the

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principle of the above rule. Such questions are fully discussed by Hale (Pleas of the Crown): Russell on Crimes, Book III, chapter iii, sect. 3, and other treatises. Generally, it may be said, that the English law is very strict in its requirements, that the person who sets up the excuse was placed in a position where the act was necessary in defence of life or for repelling a felonious attack; and that he had done all he could to avoid the necessity of such an act. See *Reg. v. Scully* (1824), 1 Car. & P. 319; *Reg. v. Smith* (1837), 8 Car. & P. 160; *Reg. v. Bull* (1839), 8 Car. & P. 22.

The question of necessity affording a justification to a charge of murder came before the Court in *Reg. v. Dudley* (1884), 14 Q. B. D. 273, 54 L. J. M. C. 32, 52 L. T. 107, 33 W. R. 347, 15 Cox C. C. 624. This case was argued and determined upon a special verdict returned by a jury upon a trial for murder. The material findings of the jury were as follows: The prisoners Dudley and Stephens, and one Brooks, were able bodied English seamen, and the deceased Parker, an English lad between seventeen and eighteen, formed the crew of an English yacht, which was cast away in a storm on the high seas, and were compelled to take to an open boat belonging to the yacht. On the 18th day, having been seven days without food and five without water, the prisoners suggested to Brooks that the boy should be sacrificed to save the rest, but Brooks dissented. The prisoner Dudley, with the assent of Stephens, but in spite of the remonstrances of Brooks, killed the boy on the 20th day after the wreck. The boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to the prisoners killing him. The three men subsequently fed on the body and blood of the boy, and were, on the fourth day after the act, rescued by a passing vessel, still alive, but in the lowest state of prostration. The verdict there found the following facts: "That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under the circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves, they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." The Court held that the facts found by the special verdict constituted murder. The judgment contains a review of the English authorities, from

the time of Bracton onwards, and recognizes the view above expressed: (1) That the person killed must be the aggressor; (2) That the act must be done in defence of life or a felonious attack upon property; and (3) that homicide afforded the only means of escape to the person assailed, or the only means of protecting his property. Indeed there seems to be no English authority in terms sanctioning the view that a person who is not attacked is justified in killing another for the purpose of protecting the life of a third person. The Court in *Reg. v. Dudley* had before it the American case of *United States v. Holmes*, 1 Wallace, Jun. 25, which sanctions the view that a passenger might be thrown overboard to save those remaining, but refused to recognize its authority as binding.

#### AMERICAN NOTES.

Mr. Bishop approves the doctrine of the principal case, referring to it with particular approbation. 1 Criminal Law, sects. 291, 291<sup>6</sup>, in the notes; and text 303<sup>6</sup>, note 16.

In *Squire v. State*, 46 Indiana, 459, the precise doctrine of the principal case was declared, citing no cases but basing its decision on Mr. Bishop's reasoning. This however was strictly *obiter*, for the request declined was simply based on "honest belief," without reference to reasonableness, and it was held that a refusal to charge as requested was "probably no error." The same was held in *Dolson v. State*, 62 Alabama, 141, where a refusal to charge that the intent was material was approved because it ignored the element of "a reasonable belief of the death" of the first wife.

In *Commonwealth v. Hayden*, 163 Massachusetts, 453, the Court said: "The different requests for rulings, founded upon the contention that the defendant was not guilty of polygamy, if at the time he contracted his third marriage, he had a *bona fide* and reasonable belief that his second wife was dead, were properly denied. We consider that question to have been settled in this jurisdiction by the decision in *Com. v. Mash*, 7 Met. 472, rendered in the year 1844, in which, speaking of a statute substantially like that under which the present defendant was indicted, this Court said that 'it was not the intention of the law to make the legality of a second marriage whilst the husband or wife is in fact living, depend upon ignorance of such party's being alive, or even upon an honest belief of such person's death.' . . . This statement has been since acted upon as a part of our system of law regulating marriages and controlling persons contemplating marriage. See *Com. v. Munson*, 127 Mass. 459, 470; 34 Am. Rep. 411. If it ought to be changed, the change should come from the Legislature. We therefore decline to treat the defendant's contention as an open question in this Commonwealth. If the reasons, which after much difference of opinion, have led to the final declaration in England, that an honest and reasonable belief in the death of the former wife or husband is a good defence to a prosecution for polygamy, should be dealt with here, it should be by that department of the government which has the law-making power. See *Queen v. Tolson*, L. R., 23 Q. B. Div. 168; 16 Cox C. C. 629."

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In *Commonwealth v. Mash*, 7 Metcalf (Mass.), 472; good faith was held no excuse where the second marriage was formed in less than seven years from the first husband's disappearance. SHAW, C. J., said:—

“It appears to us that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. Such belief might arise from a very short absence. But it appears to us, that the legislature intended to prescribe a more exact rule, and to declare, as law, that no one should have a right, upon such ignorance that the other party is alive or even upon such honest belief of his death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years, with ignorance of the absent party's being alive within that time. It is analogous to other provisions and rules by law, by which a continued absence of a person for seven years, without being heard of, will continue a presumption of his death.”

“It was urged in the argument, that where there is no criminal intent there can be no guilt; and if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense; but the conclusion drawn from it, in this case, by no means follows. Whatever one voluntarily does, he of course intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it. On this subject, the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief in the fact, and as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven years' continued absence, without knowledge of the contrary, to warrant a belief that the absent person is actually dead. One therefore who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent, by purposely doing that which the law expressly prohibits.” This was cited and followed in *Jones v. State*, 67 Alabama, 84, where the Court said: “Belief, honestly entertained, founded on mere report or rumour, will not excuse.” “There was the intent to marry a second time, not knowing the husband to be dead, who had been absent for a period of about one year only, and this is the criminal intent, and the only intent which is of the essence of the offence.”

This decision is severely criticised by Mr. Bishop (references *supra*). In *Commonwealth v. Thompson*, 11 Allen (Mass.), 23, it was held that a man might be convicted of adultery who in good faith and the belief that a woman is a widow marries and cohabits with her when she has left her husband and remained absent from him for more than seven years together without hearing of him, if in fact her husband is living. The Court conceded that it would have been different if the husband had left his wife.



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In *State v. Goodenow*, 65 Maine, 30, a man and woman being jointly indicted for adultery, the woman having a husband living, it was held no defence that her husband had married again, and therefore they supposed, and were advised by a magistrate, who married them, that they could lawfully intermarry. The Court said: "Here the accused have intentionally committed an act which is in itself unlawful. In excuse for it they plead ignorance of the law. This cannot excuse them. Ignorance of the law excuses no one. Besides, this maxim, like all others, has its exceptions. None of the exceptions however can apply here. The law, which the respondents are conclusively presumed to have known as applicable to their case, is well settled and free of all obscurity or doubt. It would perhaps be more exact to say, they are bound as if they knew the law. Late cases furnish some interesting discussions upon this subject. . . . The rule, though productive of hardship in particular cases, is a sound and salutary maxim of the law. Then the respondents say that they were misled by the advice of the magistrate, of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault to take his advice. They were bound to know or ascertain the law and the facts for themselves at their peril. A sufficient criminal intent is conclusively presumed against them in their failure to do so. The facts offered in proof may mitigate, but cannot excuse the offence charged against them. There is no doubt that a person might commit an unlawful act through mistake or accident, and with innocent intention, when there was no negligence or fault or want of care of any kind on his part, and be legally excused for it. But this case was not one of that kind. Here it was a criminal heedlessness on the part of both the respondents to do what was done by them."

In *Davis v. Commonwealth*, 13 Bush (Kentucky), 318, the honest belief that the defendant had been legally divorced was said to be of no avail. The Court said: "In most offences the evidence of the felonious intent may be met and rebutted; but in this the statute has fixed the exceptions, one of which is in favour of persons who have been lawfully divorced and permitted to marry; and the courts cannot extend this exception to persons who have not been, but who in good faith believe they have been lawfully divorced." Citing *Commonwealth v. Mash*, *supra*. But this was *obiter*, because the record of the divorce decree was "incomplete upon its face and was clearly inadmissible," &c. But that doctrine was held in *State v. Whitcomb*, 52 Iowa, 85, where the divorce had been obtained by the defendant's fraud, the Court observing: "His belief as to his rights under the decree had no effect to establish such rights."

In *Hood v. State*, 56 Indiana, 263, it was held that a decree of divorce rendered by a Court having no jurisdiction was no defence to an indictment for fornication, although "appellant did not intend to commit a crime. He intended to perform the acts he did perform. He is chargeable with notice of legal consequences."

In *Medrano v. State* (Texas), 22 Southwestern Reporter, 681, it was held that desertion by the wife for more than three years, and the husband's



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belief that the marriage had thereby become void, is no defence to an indictment for bigamy, as the mistake, if any, was one of law.

As a general rule it is held here that guilty intent is not an essential of an act that is made criminal only by statute, unless it is so declared in the enactment. For example, in the celebrated case of Miss Susan B. Anthony, who voted, knowing it to be against the law, but believing that she had the moral right to vote. *United States v. Anthony*, 11 Blatchford (U. S. Circ. Ct.), 204. So of abduction of a girl under sixteen, believing her to be above that age, or where one carried a pistol concealed on his person, simply to buy cartridges for the owner, or for use at a school exhibition. *State v. Martin*, 31 Louisiana Annual, 849; *Riley v. State* (Mississippi), 18 So. Rep. 117; *Redmond v. State*, 36 Arkansas, 58; 38 Am. Rep. 24; *Noftsinger v. State*, 7 Texas Appeals, 301. So where one sold liquors to a minor believing from his representations and appearance that he was of full age. *Carlson's License*, 127 Pennsylvania State, 330. Or sold lager beer not knowing it was lager beer. *State v. Tomasi*, 67 Vermont, 312, citing *Reg. v. Woodrow*, 15 Mees. & W. 404. So where a member of a public board made a disbursement in excess of the appropriation. *Halsted v. State*, 41 New Jersey Law, 552; 32 Am. Rep. 247. So of disturbing religious worship. *Salter v. State*, 99 Alabama, 207, 13 Southern Reporter, 535. So where a hotel waiter sells liquor on Sunday to strangers, under a mistaken belief that they are guests at the hotel at the time. *Com. v. Green*, 163 Massachusetts, 103.

In *Com. v. Weiss*, 139 Pennsylvania State, 247; 23 Am. St. Rep. 182, it was held that under a statute prohibiting the sale of oleomargarine, imposing a penalty for its violation, and containing no implication that the prohibited act must be done knowingly or wilfully, ignorance of the real character of the article is no defence. So in *State v. Newton*, 50 New Jersey Law, 534.

But the law is not universally held so strictly here. "Thus it has been held that the keeper of a billiard table, permitting a minor, contrary to statute, to play billiards, believing from his appearance and representations that he was of full age; or one who sold intoxicating liquors, contrary to statute, believing them to be free from alcohol; or one who sold intoxicating liquors to a minor, contrary to statute, believing him of full age; or without a license sold liquors but only for medicine; or an infant voting at an election, believing himself of full age, these have been absolved." Browne on Criminal Law, 2, 3; *Stern v. State*, 53 Georgia, 229; *Farrell v. State*, 32 Ohio State, 456; 30 Am. Rep. 614; *Faulks v. People*, 39 Michigan, 200; *Robinius v. State*, 63 Indiana, 235; *King v. State*, 58 Mississippi, 737; 38 Am. Rep. 344; *Gordon v. State*, 52 Alabama, 308; 23 Am. Rep. 575; and authorities in a valuable note, 30 Am. Rep. 619.

Some amusing applications of the doctrine of intent are found in North Carolina. In *State v. Linkhaw*, 69 North Carolina, 214; 12 Am. Rep. 645, it was held not a nuisance where a devout worshipper, in genuine religious enthusiasm, sang so loudly and discordantly as to disturb a religious assemblage; and so it was held of cursing so loudly at a tavern as to break up a neighbouring singing school. *State v. Baldwin*, 1 Devereux & Battle Law (Nor. Car.), 195.

Money taken under a claim of right, in good faith (as for wages or salary

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earned), is not embezzled. *Ross v. Innis*, 35 Illinois, 487; *State v. Williamson*, 118 Missouri, 146; 21 Lawyers' Rep. Annotated, 827. The Court say in the latter case: "As for the morals of the transaction, in so far as the defendant is concerned, they are certainly not to be approved or commended, but dishonest or dishonourable conduct does not always constitute criminal offence." So when an attorney retains money of his client under a disputed claim for his services, this is not embezzlement. *People v. O'Brien*, 106 California, 104, 39 Pacific Reporter, 325. But that an agent of a corporation is entitled to a specified per cent for collecting money for it will not protect him if he in fact embezzles the money collected. *Clark v. Commonwealth* (Kentucky), 29 S. W. Rep. 973. To a charge of extortion, the defendant may plead that he took the fees honestly, under a mistaken view of the law. *Cutter v. State*, 36 New Jersey Law, 125.

A singular conflict on this question of intent has arisen in respect to the burning of a jail by a prisoner, with the mere intent and purpose to make an opening for escape. Although this would not seem laudable, it being the duty of a good citizen to await his trial, and vindication or punishment, with composure, yet some highly respectable Courts have allowed so much to the natural longing for liberty of person as to excuse the act and pronounce it not to be arson. *People v. Cotteral*, 18 Johnson (New York), 118; *Jenkins v. State*, 53 Georgia, 33; 21 Am. Rep. 255; *State v. Mitchell*, 5 Iredell Law (Nor. Car.), 350; *Delany v. State*, 41 Texas, 601. Mr. Bishop says (2 Criminal Law, sect. 15), "Unhappily on this side are the majority of cases." But to the contrary: *Luke v. State*, 49 Alabama, 30; 20 Am. Rep. 269; *Smith v. State*, 23 Texas Court Appeals, 357; 59 Am. Rep. 773, overruling *Delany v. State*, *supra*. See note 21 Am. Rep. 257. In the *Luke* case the Court say: "The least privilege of escape conceded to a prisoner would carry with it the right to use any means he could command. It is a misdemeanour, if without any obstruction he merely walk away." Burning a jail for the purpose of securing the escape of a prisoner therefrom is arson. *Willis v. State*, 32 Texas Criminal Reports, 534.

Even in some felonies, guilty intent being of the essence of the crime, there can be no conviction without proof of it. Thus taking under a claim of right, however unfounded, is not larceny if the claim is made in good faith. So it is not larceny for a housekeeper to give away the outgrown clothes of her employer's children. *Severance v. Carr*, 43 New Hampshire, 65; *Baker v. State*, 17 Florida, 406; *Causey v. State*, 79 Georgia, 564; *Mielenz v. Quasdorf*, 68 Iowa, 726. But taking in accordance with a mere general custom to steal is not excusable: as where the crew of a vessel take oranges from boxes in transit, merely to gratify their palates, and not in starvation. *Com. v. Doane*, 1 Cushing (Mass.), 5. See many cases cited by Mr. Bishop, in note, 2 Criminal Law, sect. 851.

So where one forcibly takes property from the person or personal custody of another which in good faith he claims to be his own, it is not robbery. *People v. Hughes* (Utah), 39 Pacific Reporter, 492; *Brown v. State*, 28 Arkansas, 126; *Long v. State*, 12 Georgia, 293; 2 Bishop on Criminal Law, sect. 1162" (1).

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A mistaken belief that the first marriage was void because that wife had deserted him for more than three years is no defence to a charge of bigamy. *Medrano v. State*, 32 Texas Criminal Reports, 214; 40 Am. St. Rep. 775.

Two very remarkable applications of the penalties of bigamy have been made in New York in divorce cases. In *People v. Baker*, 76 New York, 78; 32 Am. Rep. 274, to an indictment for bigamy the defendant pleaded a divorce obtained by his former wife in Ohio. He was not domiciled in Ohio at the time nor present there, was not served with process, nor notified, and did not appear. The process was published in a newspaper, and the proceedings were regular and sufficient, and the judgment was valid under the laws of Ohio. But it was held void (the CHIEF JUSTICE dissenting), and the defendant was adjudged guilty of bigamy on account of a subsequent marriage in New York while the first wife was living. This was put on the substantial ground that the citizen could not, against the policy of his State, accept as valid an invalid decree of divorce granted abroad. FOLGER, J., observed:—

“It is said that a judicial proceeding to touch the matrimonial relation of a citizen of a State, whether the other party to that relation is or is not also a citizen, is a proceeding *in rem*, or as it is more gingerly put, *quasi in rem*. But it was never heard, that the courts of one State can affect in another State the *rem* there, not subjected to their process, and over the person of the owner of which no jurisdiction has been got. Now if the matrimonial relation of the one party is the *res* in one State, is not the matrimonial relation of the other party a *res* in another State? Take the case of a trust, the subject of which is in lands in several States, the trustees all living in one State. Doubtless the courts of a State in which the trustees did not live and never went, but in which were some of the trust lands, could proceed *in rem* and render a judgment without personal service of process, which would determine there the invalidity of the trust and affect the possession and title of the land within the jurisdiction of those courts; but it would not be contended, that the judgment would operate upon the trustees or upon the trust lands in other States, so as to affect the title or the possession in those States. It could operate only upon the *rem* upon which the process of those courts could lay hold. And why is not the matrimonial relation of a citizen of New York, as it exists in that State, if it is a *res*, as much exempt from the effect of such a judgment as lands in that State, and the trust under which they may be held? Is not any other relation of mankind as much a *res* for the touch and adjudication of courts as that of husband and wife? Take the relation of a minor orphan to its guardian, or to those entitled by law to be its guardians. That is a *status*, in kind as the matrimonial relation. The courts of one State may act and appoint a guardian for such a child, if it is within their territorial jurisdiction, and remains there; but the appointment is not operative *per se* in another State, into which the child goes. *Woodworth v. Spring*, 4 Allen, 321. It is of course to be granted, as before said, as a general proposition, to which it is not now needful to suggest limitations, that each State may declare and adjudge the *status* of its own citizens. And hence if one party to a proceeding is domiciled in a State, the *status* of that party, as

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affected by the matrimonial relation, may be adjudged upon and conformed or changed, in accordance with the laws of that State. But has not the State, in which the other party named in the proceedings is domiciled, also the equal right to determine his *status*, as thus affected, and to declare by law what may change it, and what shall not change it? If one State may have its policy and enforce it, on the subject of marriage and divorce, another may. And which shall have its policy prevail within its own borders, or shall yield to that of another, is not to be determined by the facility of the judicial proceedings of either, or the greater speed in appealing to them. That there is great diversity in policy is very notable. It does not, however, seem to tend to a state of harmonious and reliable uniformity, to set up the rule that the State in which the courts first act shall extend its laws and policy beyond its borders, and bind or loose the citizens of other sovereignties. It will prove awkward, and worse than that, afflictive and demoralizing, for a man to be a husband in name and under disabilities or ties in one jurisdiction, and single and marriageable in another. Yet it is only in degree that it is harder than the results of other conflicts in laws. It is more sharply presented to us, because tenderer, more sacred, more lasting relations, of greater consequence are involved; and because the occasions calling attention to the conflict have, of late years, become so frequent. Whatever we may hold in the United States, it will not change results in foreign countries. And in seeking for a rule which shall be of itself, from its own reason, correct, we ought to find or form one, if may be, that is generally applicable. However submissively we must concede to every sovereignty the right to maintain such degree of strictness in the domestic relations as it sees fit, within its own territory, there is no principle of comity which demands that another sovereignty shall permit the *status* of citizens to be affected thereby, when contrary to its own public policy, or its standard of public morals."

This decision has been denied in Alabama and North Carolina. *Thompson v. State*, 28 Alabama, 12; *State v. Schlachter*, Phillips Law (N. C.) 520. It has been followed nowhere outside New York except in Wisconsin (*Cook v. Cook*, 56 Wisconsin, 195; 43 Am. Rep. 705), where it is strongly commended, as "a logical statement of a perplexing question by a learned and able jurist." It has been followed in respect to jurisdiction in civil actions, in *O'Dea v. O'Dea*, 101 New York, 23; *Cross v. Cross*, 108 id. 628; *Williams v. Williams*, 130 id. 163. Mr. Bishop in his treatise on Marriage and Divorce criticises it severely, casting at it such reproaches as "absurd ruling," "made without reasoning and evidently without thinking," "marvellous oversight," "mental oblivion;" and of the *Cook case* he says, "that the Wisconsin laws are commensurate in wickedness and foolishness with the power of the State."

Again in *People v. Faber*, 92 New York, 116; 44 Am. Rep. 357, the defendant was convicted of bigamy for remarrying in disobedience of a prohibition in a decree of divorce rendered against him in that State. It was held that within the meaning of the statute he had "a former wife living." Two Judges dissented. Much stress was laid upon the provision in the statute, that the penalty shall not apply "to any person by reason of any former marriage which shall have been dissolved by the decree of a competent



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court for some cause other than the adultery of such person." It may very plausibly be argued however that the object of the statute is to prevent a remarriage by any person who is already under marital obligation to another; that this obligation is discharged by the statute; and that the offending party has no longer "a wife living," but that it is simply the case of a woman living who was formerly his wife.

It is however well settled that a divorce obtained in a State where neither of the parties resided at the time is no defence to an indictment for bigamy in another State. *People v. Dawell*, 25 Michigan, 247; 12 Am. Rep. 260.

An interesting question has been much discussed in this country, arising on the converse of the Rule, namely, where the guilty intent exists, and the capacity in the offender to commit the crime exists, but where owing to circumstances outside his knowledge it is incapable of effectuation.

This question came up earlier in *Regina v. Brown*, 24 Q. B. Div. 357, where seven Judges held, overruling some former adjudications, that a boy could attempt an unnatural offence with domestic fowls, although in the nature of things it was impossible of consummation. No reference is made to this decision when the point is discussed in 4 Am. & Eng. Enc. of Law, p. 657, and the contrary doctrine is there attributed to England.

The question is discussed with elaboration by Messrs. Bishop and Wharton. The point is made the subject of a recent authoritative decision in the State of New York.

In *People v. Gardner*, 144 New York, 119; 43 Am. St. Rep. 741, the defendant was indicted for an attempt to commit extortion by threatening to accuse the prosecutrix of keeping a house of prostitution. The prosecutrix was at the time acting as a decoy for the police and trying to induce the defendant to take money from her in this regard, and was in no wise actuated by fear. The Court held that the crime was committed, observing: "The threat of the defendant was plainly an act done with intent to commit the crime of extortion, and it tended, but failed, to effect its commission, and therefore, the act was plainly within the statute an attempt to commit the crime." The condition of Mrs. Amos' mind was unknown to the defendant. If it had been such as he supposed, the crime could have been, and probably would have been consummated. His guilt was just as great as if he had actually succeeded in his purpose. His wicked motive was the same, and he had brought himself fully and precisely within the letter and policy of the law. This crime as defined in the statute depends upon the mind and intent of the wrong-doer, and not on the effect or result upon the person sought to be coerced. As said in *People v. Moran* (123 N. Y. 254; 20 Am. St. Rep. 732; 10 Lawyers' Reports Annotated, 109), where the defendant was convicted of an attempt to commit the crime of larceny by thrusting his hand into the pocket of a woman which was not shown to contain anything, "the question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. . . . An attempt is made when an opportunity occurs and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle



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or condition.' In *Commonwealth v. Jacobs* (9 Allen, 274), the defendant was convicted of soliciting a person to leave the Commonwealth for the purpose of enlisting in military service elsewhere, although such person was not fit to become a soldier; and there it was said: 'Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance.' It is now the established law, both in England and this country, that the crime of attempting to commit larceny may be committed, although there was no property to steal, and thus the full crime of larceny could not have been committed. (*Reg. v. Brown*, L. R. [24 Q. B. Div.] 357; *Reg. v. Ring*, 66 Law Times R. 300; *Commonwealth v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *State v. Wilson*, 30 Conn. 500; *Clark v. State*, 86 Tenn. 511; *State v. Beal*, 37 Ohio St. 108; 41 Am. Rep. 490; *Rogers v. Commonwealth*, 5 S. & R. (Penn.) 463; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22.) In *Ree v. Holden* (Russ. & Ry. 154), it was held on an indictment under a statute against passing or disposing of forged bank notes, with intent to defraud, that it was no defence that those to whom the notes were passed knew them to be forged, and therefore, could not be defrauded. In *Reg. v. Goodchild* (2 Carr. & Kir. 293) and *Reg. v. Goodall* (2 Cox, Cr. C. 41), it was held under a statute making it a felony to administer poison or use any instrument with intent to procure the miscarriage of any woman, that the crime could be committed in a case where the woman was not pregnant. It has been held in several cases that there may be a conviction of an attempt to obtain property by false pretences, although the person from whom the attempt was made knew at the time that the pretences were false, and could not, therefore, be deceived. (*Reg. v. Hensler*, 11 Cox, Cr. C. 570; *Reg. v. Banks*, 12 id. 393; *Reg. v. Francis*, id. 613; *Reg. v. Ransford*, 13 id. 9; *Reg. v. Jarman*, 14 id. 112; *Reg. v. Eagleton*, Dearsly's Crown Cases, 515; *Reg. v. Roebuck*, D. & B. Cr. Cas. 24; *Reg. v. Ball*, 1 Carrington and Marshman, 249; *People v. Stites*, 75 Cal. 570; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22; *People v. Bush*, 4 Hill, 133; *People v. Lawton*, 56 Barb. 126; *McDermott v. People*, 5 Park Cr. Cases, 102; *Mackesey v. People*, 6 id. 114.) And to the same effect are the text books on criminal law. (1 Bishop on Criminal Law, § 723, *et seq.*) So far as I can discover there is absolutely no authority upholding the contention of the learned counsel for the defendant, that because the defendant did not inspire fear in the mind of Mrs. Amos by his threats, and thus could not have been guilty of the completed crime of extortion, therefore, he cannot be convicted of attempting to commit the crime. That contention is, as I believe, also without any foundation, in principle or reason."

In *Commonwealth v. McDonald*, *supra*, a case of attempted picking of a pocket, the Court said, "To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavour, to use exertion for some purpose. A man may make an attempt, an effort, a trial to steal, by breaking

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open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still he remains, nevertheless, chargeable with the attempt, and with the act done towards the commission of the theft. He attempted to pick the pocket of whatever he might find in it, if haply he should find anything." "I am not aware of any opposing authorities."

This doctrine was applied in *Clark v. State*, *supra*, to the case of an empty cash drawer, and in *State v. Beal*, *supra*, to the case of an empty safe. In *Hamilton v. State*, *supra*, the charge was of intent to rob one of a \$5 bank note, where the person assaulted had no such note. See *Sipple v. State*, 46 New Jersey Law, 197.

Mr. Bishop speaks of this doctrine as "this obvious conclusion of common sense," and says: "I am confident that the overruling of *Reg. v. Collins* by the English Court will be accepted in the United States as settling this question, and I am glad to be able to drop it here."

The decision in *People v. Moran*, *supra*, reversed that of the Supreme Court, 54 Hun, 279, which was given by a divided court, and founded on the two early English cases of *Regina v. McPherson*, Dears. & Bell, 197, and *Regina v. Collins*, Leigh & C. 471, the Court observing: "The criminal intent is but one element in an attempt. There must also be an act tending to effect the commission of the defined crime. If the act merely tend to show guilty purpose, but do not tend to effect the commission of the particular crime, there is no attempt in a legal sense."

In *People v. Moran*, *supra*, the Court said: "Some conflict has been observed in English authorities on this subject, and it may be conceded that the weight of authority in that country is in favour of the proposition that a person cannot be convicted of an attempt to steal from the pocket without proof that there was something in the pocket to steal. In this country however the Courts have uniformly refused to follow the cases of *Regina v. McPherson* and *Regina v. Collins*, and have adopted the more logical and rational rule that an attempt to commit a crime may be effectual, although for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment. It would seem to be quite absurd to hold that an attempt to steal property from a person could not be predicated of a case where that person had secretly and suddenly removed the contents of one pocket to another, and thus frustrated the attempt, or had so guarded his property that it could not be detached from his person. An attempt is made when an opportunity occurs and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition. Many efforts have been made to reach the north pole, but none have thus far succeeded; and many have grappled with the theory of perpetual motion, without success, possibly from the fact of its non-existence; but can it be said, in either case, that the attempt was not made?"

In *Grimm v. United States*, 156 U. S. 604, it was held that one who mails information designed to assist in obtaining obscene pictures, although called out by and in answer to a letter from a government detective writing under a fictitious name, as a decoy, is an offender against the statute.

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There must however be at least an apparent ability in the actor to effect his apparent purpose. Thus in cases of assault the ability to effect the assault must be apparent to the accused, although it is prevented from effectuation by circumstances of which we were ignorant. There is some discrepancy in the cases on this point, and it is very fully discussed in 1 Bishop on Criminal Law, sects. 742-750.

The English doctrine that an attempt to commit abortion may be made although the woman was not pregnant, has been followed in this country in *Power v. State*, 48 New Jersey Law, 31; *Commonwealth v. Taylor*, 132 Massachusetts, 261. And so where an insufficient drug is administered. *State v. Glover*, 27 South Carolina, 602; *State v. Owens*, 22 Minnesota, 238. It is not essential that the *fetus* should be alive. *State v. Howard*, 32 Vermont, 380.

In *People v. Lee Kong*, 95 California, 666; 29 Am. St. Rep. 165, where a policeman bored a hole in the roof of a building, in order to ascertain from observation whether or not the occupant was conducting a gambling or lottery game therein, and the occupant, believing the policeman to be on the roof at that point, discharged his pistol at the spot, with intent to kill, he was held guilty of assault with intent to murder, although the policeman was not at that spot but at another part of the roof. The Court said: "We cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this too regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear." Citing *State v. Napper*, 6 Nevada, 113. In this case the appellant had the present ability to inflict the injury. He knew the officer was upon the roof, and knowing that fact, he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. That the shot did not fulfil the mission intended was not attributable to forbearance or kindness of heart upon defendant's part: neither did the officer escape by reason of the fact of his being so far distant that the deadly missile could do him no harm. He was sufficiently near to be killed by a bullet from the pistol and his antagonist fired with the intent of killing him. Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for his act, and causes the act to be no less an assault."

So in *Mullen v. State*, 45 Alabama, 43; 6 Am. Rep. 691, the accused presented a loaded gun at the prosecutor and snapped it three times, but there was no cap on it. It was held that this would not avail him if he supposed there was a cap on it. The Court cite with approval Mr. Bishop's disapproval of the Indiana doctrine: "Assuming the necessary intent to exist, the act must have some adaptation also to accomplish the particular thing intended. But the adaptation need only be apparent, because the evil to be corrected relates only to apparent danger rather than to actual injury sustained." The same was held in respect of an unloaded gun supposed to be loaded, in *Beach v. Hancock*, 27 New Hampshire, 223; 59 Am. Dec. 373. In *Commonwealth v. Wade*, 110 Massachusetts, 107, the same was held where the accused knew

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that the gun was not loaded, the Court observing: "It is not the secret intention of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted." This is the doctrine of *State v. Shepard*, 10 Iowa, 126, and *State v. Smith*, 2 Humphreys (Tennessee), 457, which hold that the test is the ignorance of the threatened person that the gun is not loaded.

In *Robertson v. State*, 2 Lea (Tennessee), 239; 31 Am. Rep. 602, the Court went so far as to hold that where the prisoner, merely in sport, presented a loaded pistol at another, *both* supposing it to be unloaded, and discharged it, whereby the other was killed, it was not a crime at all, distinguishing between that case and the cases where the threatened person suppose it to be loaded.

On the other hand: where A. fires a gun at B. at the distance of forty feet, with intent to murder him, believing it to be loaded with ball, whereas it contains only powder and a wad, there is no assault with intent to kill. *State v. Swails*, 8 Indiana, 524; 65 Am. Dec. 772; *Kunkle v. State*, 32 Indiana, 220. This doctrine was adopted in *State v. Napper*, 6 Nevada, 113. In *Kunkle v. State*, *supra*, it was held however that where the shooting failed of deadly effect simply because the distance was too great, the attempt was nevertheless perfect. But the other view was taken in *State v. Godfrey*, 17 Oregon, 300; 11 Am. St. Rep. 830, when the precise holding was that an unloaded gun presented at a distance of from thirty to seventy yards was not "a dangerous weapon." The Court discard the element of fear in the threatened party as the controlling test. (*Contra: State v. Herron*, 12 Mont. 230.) So *Chapman v. State*, 78 Alabama, 463; 56 Am. Rep. 42, holds that it is not a criminal assault to present an unloaded gun at a person within shooting distance, he not knowing it is unloaded. This case cites most of the decisions *pro* and *con*, and is a careful review, the conclusion being: "an assault involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect." "One may obviously be assaulted, although in complete ignorance of the fact, and therefore entirely free from alarm." "Mere menaces, whether by words or acts, without intent or ability to injury, are not punishable crimes."

So administering a substance supposed to be poisonous, but really harmless, is not an attempt to poison, although the intent was guilty. *State v. Clarissa*, 11 Alabama, 57.

Many of the foregoing decisions are manifestly irreconcilable, and some of the illustrations given in support of the old English doctrine are very plausible, as for example, the maliciously firing at vacancy supposing it to be a plate-glass window, or at a scarecrow supposing it to be a human being. The true test seems to be this: if the attempt upon the actual could in any wise have succeeded according to the actor's intent and expectation, it is a legal attempt; otherwise not. So the action of firing at vacancy or a scarecrow cannot constitute the attempt to break a window or murder a human being because those objects are not present to be acted upon. But if an undertaking to murder was defeated because the person wore an invulner



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able concealed suit of armour, it will still constitute an attempt, and so if the real glass proved too strong. In the fowl case the conditions were all present, and so there was an attempt in the legal sense; if the ducks in that case had been glass decoy ducks, it must have been different. This view would shut out of the class of attempts the false pretence of shooting with a gun which the bearer knew not to be loaded, although the one threatened supposed it was loaded.

It is well settled in this country that if one accused of homicide was so drunken at the time of the commission as to be unable to form the essential intent to take life, while he is not thereby excused, yet the crime is thereby reduced to the rank of manslaughter, or to murder in the second degree under statutes which make deliberation an ingredient. And in like manner it has been held that one so drunken as not to know what he is doing cannot be convicted of larceny. It is sufficient to refer to *Jones v. Commonwealth*, 75 Pennsylvania State, 403; *State v. Tricas*, 32 Louisiana Annual, 1086; 36 Am. Rep. 293; note, 40 Am. Rep. 560; *Aszman v. State*, 123 Indiana, 347; *Wood v. State*, 34 Arkansas, 341; 36 Am. Rep. 13; *Loza v. State*, 1 Texas App. 488; 28 Am. Rep. 416; *Garner v. State*, 31 Florida, 170; *Chatham v. State*, 92 Alabama, 47.

There is a serious question whether one unlawfully and murderously assailed is bound to retreat, or may stand his ground and intentionally kill his assailant.

The old common law is generally believed to have held that if a man was murderously assailed he could not stand his ground and forcibly resist, but must run away if he could, or "retreat to the wall," as the old phrase was, if he could safely do so. Probably most of the old cases held this, and probably the doctrine has been pretty generally accepted in this country until a recent period. The old text-writers differed, however, Hale laying down the duty to retreat, East holding the contrary. This was a singular inconsistency in the common law, for under that law one might not do for himself what he might do for his wife, his child, or even a stranger, that is, forcibly prevent a felony. In *State v. Trammell*, 40 S. C. 331; 42 Am. St. Rep. 874, it was said: "There are cases however where no retreat is demanded by the law. For instance, the honor of one's family, when in peril by the evil-minded, permits nothing save action, and no step backward is tolerated." The law was inconsistent also in its application of the doctrine, making a distinction between an assault in one's own house and an assault outside, even on his own land; even holding that a man threatened with highway robbery, with a good horse under or in front of him, and thus well provided for retreat, was not bound even to try to run away. Mr. Bishop, who is always original, scouts the doctrine of retreating (as does Wharton), and holds that one failing to resist a murderous attack and endeavouring to get away is guilty of misprision of felony!

The States of Iowa and Alabama are prominent adherents to the old dogma of the necessity of retreating. In *State v. Donnelly*, 69 Iowa, 705; 58 Am. Rep. 234, it is held that where one is feloniously and dangerously assailed, he is bound to retreat if he can do so without danger; citing *People v. Sullivan*,



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7 N. Y. 396, and cases from Georgia, Mississippi, and California. (The doctrine of the Sullivan case is that "the right to defend himself would not arise until he had done everything in his power to avoid the necessity of defending himself." In *Shorter v. People*, 2 New York, 193, the Court said: "After a conflict has commenced, he must quit it, if he can do so in safety, before he kills his adversary;" but this was *obiter* because the assault by the deceased was only with the naked hand, and the defendant pursued him with a deadly weapon; so the question of retreat was not involved.) The Alabama Court carries the duty of retreating to extreme length. Thus in *Lee v. State*, 92 Alabama, 15; 25 Am. St. Rep. 17, it was held that one must retreat even from his own land, if beyond the curtilage; and in *Martin v. State*, 90 Alabama, 602; 24 Am. St. Rep. 844, it was held that when one assailed in his own house retreated from it, he lost the protection of his "castle," and must continue his retreat, and could not defend himself with a deadly weapon unless it appeared to be reasonably necessary to avoid great bodily harm. "It is the duty of one assailed to flee if flight is possible." *Commonwealth v. Breyessee*, 160 Pennsylvania State, 451; 40 Am. St. Rep. 729; *State v. Corley*, (So. Car.) 20 Southwestern Reporter, 989; *State v. Walker*, 9 Houston (Delaware), 464.

But there is an important and increasing line of recent decisions which deny that one thus assailed must retreat at all, and hold that he may "stand his ground."

In *Rungan v. State*, 57 Indiana, 80; 26 Am. Rep. 52, the Court said: "A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our Courts, bearing on the general subject of the right of self-defence. The weight of modern authority, in our judgment, establishes the doctrine that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable." And so a charge that "before a man can take life in self-defence, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault," was held error. This doctrine is reiterated by the same Court in *State v. Page*, 40 N. E. Rep. 745, where the duty of retreating is limited to cases of non-felonious assaults and mutual broils and combats. The Court observe:—

"But if applied to all cases where a person going his lawful way is assaulted, without reference to the question whether a felony or a mere trespass on the person is manifestly intended, it (the duty of retreat) would require a man to flee before another who murderously assailed, or a traveller to flee

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before a highway robber, or a woman to flee before her would-be ravisher, before resorting to extreme measure of defence. It is safe to say that the law puts upon a person no such necessity. The old writers on 'justifiable homicide' -- that is, homicide committed in the resistance of felonies -- make no mention of the duty of retreating."

The same doctrine was adopted by the Ohio Supreme Court, in *Erwin v. State*, 29 Ohio St. 186; 23 Am. Rep. 733, where the subject is learnedly examined, and the decision was that where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavours to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm. The Court remark: "We can safely say that the rule announced is at least the surest to prevent the occurrence of occasions for taking life; and this by letting the would-be robber, murderer, ravisher, and such like know that their lives are in a measure in the hands of their intended victims."

It has even been held that the person threatened may assume the defensive-offensive and make his assailant retreat in case of reasonable apprehension. So the Michigan Supreme Court, in *Pond v. People*, 8 Michigan, 177, held: "If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger." This was followed, *People v. Dunn*, 53 Michigan, 490; 51 Am. Rep. 151, when the deceased came armed upon the defendant's premises to take away property purchased by him at an invalid execution sale.

In Kentucky the Courts go still further, and hold, as in *Bohannon v. Commonwealth*, 8 Bush, 481; 8 Am. Rep. 471, that where a man has been threatened by another with murderous violence, he may arm himself and go about his legitimate business, and if "he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances of the meeting, he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting."

In Missouri, the doctrine of the last case has received an extension, and it was held in the very recent case of *State v. Evans*, 28 S. W. Rep. 8, that one whose life has been threatened may arm himself and knowingly go into the vicinity of the threatening party; and that the mere fact that he does so in the expectation of being attacked will not deprive him of the right to take life in self-defence. In commenting upon this case a recent writer of the "Harvard Law Review" suggests a doubt whether the right of the threatened

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person to go into his enemy's presence is not dependent on the necessity of his doing so in the pursuit of his legitimate business. But I agree with the editor of the "New York Law Journal" that no such distinction is reasonable, and that no person can by murderous threats exclude another from any part of the habitable globe, so long as he does not provoke an assault. The doctrine intimated by the "Review" would be extremely inconvenient in case the threatening party were a commercial traveller or a post-office carrier. May not one go to church or to the theatre although he knows his enemy is lying in wait for him there? The liberty of the citizen may not be thus circumscribed. In some of our frontier communities such a rule would amount to a serious embarrassment if not a total suspension of commercial industry and enterprise.

The most recent and authoritative judicial declaration on this subject is found in the case of *Babe Beard*, 158 United States, 550. This was a case of homicide upon the defendant's premises and in resistance to an unlawful carrying away of his property, and must be regarded as a notable extension of the "castle" doctrine. Mr. Justice HARLAN said:—

"The Court, several times in its charge, raised or suggested the inquiry whether Beard was in the lawful pursuit of his business, that is, doing what he had a right to do, when, after returning home in the afternoon, he went from his dwelling-house to a part of his premises near the orchard fence, just outside of which his wife and the Jones brothers were engaged in a dispute,—the former endeavouring to prevent the cow from being taken away, the latter trying to drive it off the premises. Was he not doing what he had the legal right to do, when, keeping within his own premises and near his dwelling, he joined his wife, who was in dispute with others, one of whom, as he had been informed, had already threatened to take the cow away or kill him? We have no hesitation in answering this question in the affirmative. . . . In our opinion, the Court below erred in holding that the accused, while on his premises, outside of his dwelling-house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused.

"The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as under all the circumstances he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

The necessity for retreating is necessarily ignored, although the point is

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not explicitly passed upon in *Tillery v. State*, 24 Texas App. 251; 5 Am. St. Rep. 882, and *Barnards v. State*, 88 Tennessee, 183; and in *Perkins v. State*, 78 Wisconsin, 551, it was held error to charge that self-defence "will not justify the killing if the necessity for the killing can be avoided by retreat;" and in *State v. Reed*, 53 Kansas, 767; 42 Am. St. Rep. 322, it was held "that if one is unlawfully attacked by another, he may stand his ground and use such force as reasonably appears necessary to repel the attack and protect himself."

It seems to the writer that the modern doctrine is the more reasonable. As the question of the safety of retreat is one that must be instantly decided by the person assailed, he should be left to judge of it, and if he chooses to stand his ground he is exercising the right of the citizen and should be absolved. There is no pretence that one assailed with bare fists may not resist with bare fists and is not bound to run away, and it seems a travesty on justice to say that a would-be murderer has larger privileges and must be afforded a greater opportunity to commit wrong.

**No. 3. — REG. v. HICKLIN.**

(Q. B. 1868.)

**RULE.**

WHERE the act charged as criminal is in itself injurious to the public, it is no defence that the prisoner (or defendant) was actuated by a laudable motive or object.

**Reg. on the Prosecution of Henry Scott, Appellant, v. Benjamin Hicklin and another, Justices of Wolverhampton, Respondents.**

L. R., 3 Q. B. 360-379 (S. C. 37 L. J. M. C. 89; 16 W. R. 801; 11 Cox C. C. 19).

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*Mens rea. — Obscene Publication.*

By 29 & 31 Vict. c. 83, s. 1, if upon complaint that there is reason to believe that any obscene books, &c. are kept in any house or other place, for the purpose of sale or distribution, and upon proof that one or more of such articles has been sold or distributed in connection with such place, justices may, upon being satisfied that such articles are of such a character and description that the publication of them would be a misdemeanour and proper to be prosecuted as such, order by special warrant that such articles shall be seized, and after summoning the occupier of the house, the same or other justices may, if they are satisfied that the articles seized are of the character stated in the warrant, and have been kept for the purposes aforesaid, order them to be destroyed.

A number of copies of a pamphlet entitled, "The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confes-



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sional, and the questions put to females in confession," were seized in the appellant's house and ordered by justices of a borough to be destroyed as obscene books within the above section.

On appeal, the following facts were found. The pamphlet consisted of extracts taken from the writings of theologians on the doctrine and discipline of the Romish Church, and particularly on the practice of auricular confession. On one side of the page were passages in the original Latin, and opposite to each passage was a free translation in English. The pamphlet also contained a preface and notes condemnatory of the tenets and principles of the writers. About half of the pamphlet related to controversial questions, but the latter half of the pamphlet was grossly obscene, as relating to impure and filthy acts, words, and ideas. The appellant sold the pamphlets at the price he gave for them to any one who applied for them. He did not keep the pamphlets to sell for profit or gain, nor for the purpose of prejudicing good morals, though the indiscriminate sale and circulation of them was calculated to have that effect; but he kept and sold them for the purpose of exposing what he deemed to be the errors of the church of Rome, and particularly the immorality of the confessional. The recorder, being of opinion that the sale and distribution of the pamphlets under the above circumstances would not be a misdemeanour, quashed the order of justices: —

*Held*, that the order of justices was right; for that the publication of such an obscene pamphlet was a misdemeanour, and was not justified or excused by the appellant's innocent motives or object; he must be taken to have intended the natural consequences of his act.

At the quarter sessions for the borough of Wolverhampton, on the 27th of May, 1867, Henry Scott appealed against an order \* made by two justices of the borough under 20 & 21 [\* 361] Vict. c. 83,<sup>1</sup> whereby the justices ordered certain books

<sup>1</sup> 20 & 21 Vict. c. 83, "An act for more effectually preventing the sale of obscene books, pictures, prints, and other articles," after reciting "that it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles."

"Section 1. It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices, upon complaint made before them upon oath that the complainant has reason to believe, that any obscene books, &c. are kept in any house, &c., for the purposes of sale or distribution, exhibition for the purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold,

distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justice that the belief of the said complainant is well founded, and upon such justice being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such



[\*362] which had been seized \*in the dwelling-house of the appellant, within their jurisdiction, to be destroyed, as being obscene books within the meaning of the statute.

The appellant is a metal broker, residing in the town of Wolverhampton, and a person of respectable position and character. He is a member of a body styled "The Protestant Electoral Union," whose objects are, *inter alia*, "to protest against those teachings and practices which are un-English, immoral, and blasphemous, to maintain the Protestantism of the Bible and the liberty of England," and "to promote the return to Parliament of men who will assist them in these objects, and particularly will expose and defeat the deep-laid machinations of the Jesuits and resist grants of money for Romish purposes." In order to promote the objects and principles of this society, the appellant purchased from time to time, at the central office of the society in London, copies of a pamphlet, entitled "The Confessional Unmasked; showing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession;" of which pamphlets he sold between two and three thousand copies at the price he gave for them, viz., 1s. each, to any person who applied for them.

A complaint was thereupon made before two justices of the borough, by a police officer acting under the direction of the Watch Committee of the borough, and the justices issued their

house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place, which may have been so entered by virtue of the said warrant, to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such, or any of them, have been

kept for any of the purposes aforesaid, it shall be lawful for the justices, and they are hereby required, to order the articles so seized, except such of them as they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned [s. 4] be given, and such articles shall be in the mean time impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized."

By s. 4 an appeal is given to the next quarter sessions to any one aggrieved by the determination of justices.

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warrant under the above statute, by virtue of which warrant 252 of the pamphlets were seized on the premises of the appellant, and ordered by the justices to be destroyed.

The pamphlet<sup>1</sup> consists of extracts taken from the works of certain theologians who have written at various times on the \*doctrines and discipline of the Church of Rome, and [\*363] particularly on the practice of auricular confession. On one side of the page are printed passages in the original Latin, correctly extracted from the works of those writers, and opposite to each extract is placed a free translation of such extract into English. The pamphlet also contains a preface and notes and comments, condemnatory of the tracts and principles laid down by the authors from whose works the extracts are taken. About one half of the pamphlet relates to casuistical and controversial questions which are not obscene; but the remainder of the pamphlet is obscene in fact as relating to impure and filthy acts, words, and ideas. The appellant did not keep or sell the pamphlets for purposes of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlets, as a member of the Protestant Electoral Union, to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the Confessional.

The recorder was of opinion that under these circumstances, the sale and distribution of the pamphlets would not be a misdemeanour, nor, consequently, be proper to be prosecuted as such, and that the possession of them by the appellant was not unlawful within the meaning of the statute. He therefore quashed the order of the justices, and directed the pamphlet seized to be returned to the appellant, subject to the opinion of the Court of Queen's Bench.

If the Court should be of opinion upon the facts stated, that the

<sup>1</sup> A copy accompanied and was made part of the case. The authors from which the obscene parts of the pamphlet were taken were Peter Dens, Liguori, Delahogue de Pénitentiâ, Bailly, and Cabasutius, — chiefly the first two. In the preface, after alluding to the different authors quoted, and showing that they were held of great authority in the Roman Catholic Church, the compiler pro-

ceeds: "Such, then, is the theology, and such the morals, which, by granting £30,000 a year to Maynooth, we assist in propagating." . . . "In the latter part of the pamphlet I have given a few extracts without abridgment, to show into what minute and disgusting details these *holy men* have entered. This alone has been my object, and not the filling of the work with obscenity."

sale and distribution of the pamphlets by the appellant would be a misdemeanour, and proper to be prosecuted as such, the order of the justices for destroying the pamphlets so seized was to be enforced; if not, the order was to be quashed.

Kydd, for the appellant. The decision of the recorder was right, the intention of the appellant being innocent, the publication of this pamphlet was not an indictable misdemeanour; and therefore the justices had no jurisdiction to order the copies to be destroyed. The book is controversial.

[COCKBURN, C. J. The recorder has found that the [\* 364] work, at least, \* the latter half of it, is obscene, and there can be no doubt of it; and the question is, that being so, are the magistrates deprived of jurisdiction to destroy this obscene work, because the real object of the appellant in distributing it was not to do harm, but good?]

The criminal intention must be shown before the justices have jurisdiction; but here that intent is expressly negatived. Thus in *Woodfall's Case*, 20 St. Tr. at p. 919; 5 Burr. at pp. 2666, 2667, Lord MANSFIELD told the jury, "That, where an act, in itself indifferent, if done with a particular intent becomes criminal, then the intent must be proved and found; but when the act is in itself unlawful, . . . the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." But the question of intent is for the jury, per Lord ELLENBOROUGH in *Reg. v. Lambert*, 2 Camp. at p. 404, 11 R. R. 748; although the law was formerly otherwise, *Reg. v. Shebbeare*, 3 T. R. 430, n.; see also, however, per HOLT, C. J., in *Tutchin's Case*, 14 St. Tr. at p. 1125. In *Fowler v. Padget*, 7 T. R. 509, 514, 4 R. R. 511, 513, it was held that a debtor leaving his house did not commit an act of bankruptcy, though creditors were delayed, unless there was an intention to delay, and Lord KENYON observed, "It is a principle of natural justice and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the act must both concur to constitute the crime." In *Reg. v. Sleep, Leigh and Cave*, 44, 54; 30 L. J. M. C. 170, 173, in which an indictment was laid under 9 & 10 Wm. III. c. 41, s. 2, for having been in possession of naval stores, and the jury negatived that the prisoner knew that the stores were marked with the broad arrow, COCKBURN, C. J., said, "It is a principle of our law that to constitute an offence there must be a guilty mind, and that principle

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must be imported into the statute, although the Act itself does not in terms make a guilty mind necessary to the commission of the offence." *Reg. v. Dodsworth*, 2 Mood. & Rob. 72, and *Reg. v. Allday*, 8 C. & P. 136, are to the same effect. In *Backmaster v. Reynolds*, 13 C. B. (N. S.) 62, 68, ERLE, C. J., says, "A man cannot be said to be guilty of a delict unless to some extent his mind goes with the act. Here it seems that the respondent acted on the belief that he had a right to enter the room, and that he had no intention to do a wrongful act." \*The [\*365] mere use of obscene words, or the occurrence of obscene passages, does not make the work obscene. Thus Milton, in his celebrated defence of himself,<sup>1</sup> justifies by examples the use of language adequate to the occasion, though it may be obscene. On this principle it is that the defence of unlicensed printing has always been based. The opposite principle is that of the Church of Rome. Thus in Hallam's *Literature of Europe*, part ii., c. 8, s. 70, it is said, "Rome struck a fatal blow at literature in the Index Expurgatorius of prohibited books. . . . The first list of books prohibited by the church was set forth by Paul IV. in 1559. His index includes all Bibles in modern languages, enumerating forty-eight editions, chiefly printed in countries still within the obedience of the church." If mere obscenity, without reference to the object, is indictable, Collier's *View of the Immorality of the English Stage*, written with the best motives and published with the best results, would have been indictable. The same may be said of David Clarkson's works, just now republished in Edinburgh, with a preface by Dr. Miller. What can be more obscene than many pictures publicly exhibited, as the *Venus* in the Dulwich gallery?

[LUSH, J. It does not follow that because such a picture is exhibited in a public gallery, that photographs of it might be sold in the streets with impunity.]

What can be more obscene than Bayle's *Dictionary*, or many of the works of the standard authors in English poetry, from Chaucer to Byron?—Dryden's translation, for instance, of the sixth satire of Juvenal? Or Savage's *St. Valentine's Day*? And yet of Savage, the great moralist, Dr. Johnson<sup>2</sup> says, alluding to the attempt to prosecute him in the King's Bench for his "Progress

<sup>1</sup> Probably "Authoris pro se defensio contra Alexandrum Morum."

<sup>2</sup> *Lives of the English Poets*.



of a Divine," as being an obscene libel: "It was urged in his defence, that obscenity was criminal when it was intended to promote the practice of vice; but that Mr. Savage had only introduced obscene ideas with the view of exposing them to detestation, and of amending the age by showing the deformity of wickedness. This plea was admitted, and Sir PHILIP YORKE, who then presided in that court, dismissed the information, with encomiums upon the purity and excellence of Mr. Savage's writings."

[\* 366] So here, the \* object of the compiler, as expressed in his preface and his comments throughout the pamphlet, is to expose the obscenity and grossness of the Romish practice of the confessional. In *Murray v. Benbow*, Jac. 474, n., shortly noticed with other cases in Phillips on Copyright, pp. 23-25, Lord ELDON, C., refused an injunction to restrain the sale of a pirated edition of Lord Byron's *Cain* on the ground that it was a profane libel. Lord ELDON's judgment is given in the prefatory notes to *Cain* in the collected editions of Byron's works by Moore. And the learned Judge expressly puts the distinction of the author's motive. Thus, alluding to *Paradise Lost* and *Regained*, he says: "It appears to me that the great object of the author was to promote the cause of Christianity. There are undoubtedly a great many passages in it, of which, if that were not the object, it would be very improper by law to vindicate the publication; but, taking it altogether, it is clear that the object and effect was not to bring disrepute, but to promote the reverence, of our religion."

[BLACKBURN, J. "Object and effect;" concede the object here to be good, what was the effect?]

Starkie, in his *Law of Slander and Libel*, vol. ii., p. 147, 2d edit., treating of blasphemy as a crime, says: "A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken man's sense of religious or moral obligations, to insult those who believe by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and

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form of worship into disgrace and contempt, the offence against society is complete."

[BLACKBURN, J. The argument to meet the present case must go the length, that the object being good, or at all events innocent, would justify the publication of anything however indecent, however obscene, and however mischievous.

\* LUSH, J. And by any means such as giving away [\*367] obscene extracts like these as tracts.

COCKBURN, C. J. A medical treatise, with illustrations necessary for the information of those for whose education or information the work is intended, may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for any one, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication.]

The animus must always be looked at. Thus in *Moran's Case*, 2 Mod. St. Tr. by Townsend, at p. 388, which was a prosecution of the publisher of Shelley's works for blasphemy, Lord DENMAN, C. J., in summing up, is reported to have said: "The purpose of the passage cited from 'Queen Mab' was, he thought, to cast reproach and insult upon what in Christian minds were the peculiar objects of veneration. It was not however, sufficient that mere passages of such an offensive character should exist in a work, in order to render the publication of it an act of criminality. It must appear that no condemnation of such passages appeared in the context." Such condemnation does appear in page after page of this pamphlet. ALDERSON, B., distinctly recognized the right of every one to attack the errors of any sect of religion. In *Guthrie's Case*, 2 Lewin's C. C. at p. 254, that learned Judge told the jury, "A person may, without being liable to prosecution for it, attack Judaism, Mohammedanism, or even any sect of the Christian religion (except the established religion of the country). . . . The defendant here has a right to entertain his opinions, to express them, and to discuss the subject of the Roman Catholic religion and its institutions." Lord Mansfield expressed himself to the same effect in a speech in the House of Lords, which is cited by Lord Campbell in his life of Lord Mansfield.<sup>1</sup>

<sup>1</sup> "There never was a single instance, common law of England, which is only from the Saxon times down to our own, common reason or usage, knows of no in which a man was punished for erroneous opinions concerning rites or modes of prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian worship, but upon some positive law. The religion there have been instances of per-

[\* 368] \* The 20 & 21 Vict. c. 83, s. 1, does not make the mere possession or sale of an obscene work sufficient, and the question is therefore *quo animo* was the publication; and the mere committing of the act is not sufficient, as in 3 & 4 Wm. IV. c. 15, s. 2, or 5 & 6 Vict. c. 93, s. 3. Here the publication of this pamphlet, though obscene, was with an honest intention of exposing the Roman Confessional, an object honestly carried out by correct quotations of the original Latin, correctly translated. The recorder has found that this was the intention, and he therefore rightly decided that the publication was not a misdemeanour.

A. S. Hill, Q. C., for the respondents. The preamble of the statute, taken with the enacting part, shows what the intention of the Legislature was, and the question is whether the pamphlet was of such a character as to make the publication of it a misdemeanour.

[COCKBURN, C. J. The section says, "for the purposes of gain."]

The word "gain" does not occur in the clause, "for the purpose of sale or distribution." If the work be of an obscene character, it may be questioned whether intention has anything to do with the matter. But, if intention is necessary, it must be inferred that the appellant intended the natural consequences of his act, which the recorder finds are to prejudice good morals, and the motive of such a publication cannot justify it. Thus, an indictment lies for carrying a child with an infectious disease in the public streets, though there was no intention to do injury to the passengers: *Rev v. Fontandillo*, 4 M. & S. 73, 16 R. R. 389. In *Rev v. Topham*, 4 T. R. at p. 127, 2 R. R. 345, Lord KENYON says: "It was argued, that even supposing there was sufficient evidence of publication, there was no evidence of a criminal intent in the

[\* 369] defendant. To this I can answer in the words of \* Lord

sons prosecuted and punished upon the common law; but bare nonconformity is no sin by the common law." — *Lives of the Chief Justices*, vol. ii. pp. 512-514. *Life of Lord Mansfield*. — The case is that of *Harrison v. Evans* (3 Br. Parl. C. 465), and was an action of debt for penalties commenced in the Sheriff's Court against Evans for not serving the office of sheriff, which he refused, on account of being a dissenter, and not having received the sacrament according to the rites of

the Church of England within a year before his election. The extracts from Lord Mansfield's speech in the House of Lords, that are quoted by Lord Campbell, are from the speech as given by Dr. Philip Furneaux (not Faraceux as printed in Campbell's *Lives*) in an appendix to the second edition of "Letters to Mr. Justice Blackstone concerning his Exposition of the Act of Toleration." London, Cadell, 1771; see pp. 277-278.

MANSFIELD in *Reg. v. Woodfall*, 5 Burr. at p. 2667, that ‘where the act is in itself unlawful (as in this case), the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent;’” and this passage is again cited with approbation by Lord ELLENBOROUGH in *Reg. v. Phillips*, 6 East, at p. 473, 8 R. R. 51.

[BLACKBURN, J. Lord ELLENBOROUGH propounded the same principle in *Reg. v. Dixon*, 3 M. & S. 11, 15, 4 Camp. 12, 15 R. R. 381.]

The ruling of ALDERSON, B., in *Gathercole's Case*, 2 Lewin's C. C. at p. 255, part of which was cited for the appellant, is also in point. “This indictment charges the defendant with intending to injure the character of the prosecutors; and every man, if he be a rational man, must be considered to intend that which must necessarily follow from what he does.” In Starkie on Slander and Libel, vol. ii. p. 158, 2d ed., it is said, “Ever since the decision in *Carl's Case*, 2 Strange, 788, it seems to have been settled, that any publication tending to the destruction of the morals of society is punishable by indictment. . . . Although many vicious and immoral acts are not indictable, yet if they tend to the destruction of morality in general, if they do or may affect the mass of society, they become offences of a public nature.” *Reg. v. Read*, Fort. 98, 100, was to the contrary; it was there held that an indictment would not lie for publishing an obscene libel, unless it libelled some one; and the note added by Fortescue is remarkable, and much in point. “N. B. There was the case of the *King v. Carl* in B. R., which was an indictment for printing and publishing a libel called *The Nun in her Smock*, which contained several bawdy expressions, but did contain no libel against any person whatsoever: the Court gave judgment against the defendant, but contrary to my opinion; and I quoted this case. And, indeed, I thought it rather to be published on purpose to expose the Romish priests, the father confessors, and the popish religion.”

[The Court then adjourned; on the Judges' return into court.]

COCKBURN, C. J. We have considered this matter, and we are of opinion that the judgment of the learned recorder must be reversed, \*and the decision of the magistrates [\*370] affirmed. This was a proceeding under 20 & 21 Vict. c. 83, s. 1, whereby it is provided that, in respect of obscene books,



&c., kept to be sold or distributed, magistrates may order the seizure and condemnation of such works, in case they are of opinion that the publication of them would have been the subject-matter of an indictment at law, and that such a prosecution ought to have been instituted. Now, it is found here as a fact that the work which is the subject-matter of the present proceeding was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come. The magistrates must have been of opinion that the work was indictable, and that the publication of it was a fit and proper subject for indictment. We must take the latter finding of the magistrates to have been adopted by the learned recorder when he reversed their decision, because it is not upon that ground that he reversed it: he leaves that ground untouched, but he reversed the magistrate's decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so to affect the public mind, but to expose the practices and errors of the confessional system in the Roman Catholic Church. Now, we must take it, upon the finding of the recorder, that such was the motive of the appellant in distributing this publication: that his intention was honestly and *bonâ fide* to expose the errors and practices of the Roman Catholic Church in the matter of confession: and upon that ground of motive the recorder thought an indictment could not have been sustained, inasmuch as to the maintenance of the indictment it would have been necessary that the intention should be alleged and proved, namely, that of corrupting the public mind by the obscene matter in question. In that respect I differ from the recorder. I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character. It is quite clear that the publishing an obscene [\*371] \*book is an offence against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary

productions of this country the tendency of which is immodest, and, if you please, immoral, and possibly there might have been subject matter for indictment in many of the works which have been referred to. But it is not to be said, because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecution; namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character. The very reason why this work is put forward to expose the practices of the Roman Catholic Confessional is the tendency of questions, involving practices and propensities of a certain description, to do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case as between the priest and the person confessing, it manifestly must equally be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy and disgusting and unnatural description it is possible to imagine. I take it therefore, that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that, consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But, then, it is said for the appellant, "Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the Confessional." Be it so. The question then presents itself in this simple form: May you commit an offence against the law in order that thereby you may effect \*some ulterior object which you have in [\*372] view, which may be an honest and even a laudable one? My answer, is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published.

and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good may be accomplished? In order to prevent the spread and progress of Catholicism in this country, or possibly to extirpate it in another, and to prevent the state from affording any assistance to the Roman Catholic Church in Ireland, is he justified in doing that which has necessarily the immediate tendency of demoralizing the public mind wherever this publication is circulated? It seems to me that to adopt the affirmative of that proposition would be to uphold something, which, in my sense of what is right and wrong, would be very reprehensible. It appears to me the only good that is to be accomplished is of the most uncertain character. This work, I am told, is sold at the corners of streets, and in all directions, and of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains. And for what? To prevent them, it is said, from becoming Roman Catholics, when the probability is, that nine hundred and ninety-nine out of every thousand into whose hands this work would fall would never be exposed to the chance of being converted to the Roman Catholic religion. It seems to me that the effect of this work is mischievous and against the law, and is not to be justified because the immediate object of the publication is not to deprave the public mind, but, it may be, to destroy and extirpate Roman Catholicism. I think the old sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals: and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good.

I think, therefore, the case for the order is made out, and [\* 373] although I quite concur in thinking that the \* motive of the parties who published this work however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act, at any rate that they knew perfectly well that this work must have the tendency which, in point of law, makes it an obscene publication;

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namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene publication. I hold that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, *quoad* the intention and *quoad* the act, it does not lie in the mouth of the man who does it to say, "Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose." The law does not allow that; you must abide by the law, and if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal. I think, therefore, that the recorder's judgment must be reversed, and the order must stand.

BLACKBURN, J. I am of the same opinion. The question arises under the 20 & 21 Vict. c. 83, an Act for "the more effectually preventing the sale of obscene books," and so forth; and the provision in the first section is this: — [The learned Judge read the section.] Now, what the magistrate or justices are to be satisfied of is that the belief of the complainant is well founded, and also "that any of such articles so published for any of the purposes aforesaid, are of such a character and description," that is to say of such an obscene character and description, that the publication of them would be a misdemeanour, and that the publication in the manner alleged would be proper to be prosecuted; and having satisfied themselves in respect of those things, the magistrates may proceed to order the seizure of the works. And then the justices in petty sessions are also in effect to be satisfied of the same three things; first, that the articles complained of have been kept for any of the purposes aforesaid, and that they are of the character \*stated in the warrant, [\* 374] that is, that they are of such a character that it would be a misdemeanour to publish them; and that it would not only be a misdemeanour to publish them, but that it would be proper to be prosecuted as such; and then, and then only, are they to order them to be destroyed. I think, with respect to the last clause, that the object of the Legislature was to guard against the vexatious prosecution of publishers of old and recognized standard



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works, in which there may be some obscene or mischievous matter. In the case of *Reg. v. Moran*, 2 Mod. S. Tr. 356, and in many of the instances cited by Mr. Kydd, a book had been published which, in its nature, was such as to be called obscene or mischievous, and it might be held to be a misdemeanour to publish it; and on that account an indictable offence. In *Moran's Case* the publication of Shelley's "Queen Mab" was found by the jury to be an indictable offence; I hope I may not be understood to agree with what the jury found, that the publication of "Queen Mab" was sufficient to make it an indictable offence. I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance. So whether the publication of the whole works of Dryden is or is not a misdemeanour, it would not be a case in which a prosecution would be proper; and I think the Legislature put in that provision in order to prevent proceedings in such cases. It appears that the work in question was published, and the magistrates in petty sessions were satisfied that it was a proper subject for indictment, and their finding as to that accords with the view we entertain. Then there was an appeal to the recorder in quarter sessions to reverse their decision, which appeal was successful. The learned recorder, in stating the grounds on which he reversed their decision, says, "About one half of the pamphlet relates to casuistical and controversial questions which are not obscene; but the latter half of the pamphlet is obscene in fact, as containing passages which relate to impure and filthy acts, words, and ideas. The appellant did not keep or sell the pamphlets for purposes of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect: but he kept and sold the pamphlet as a member of the Protestant [\* 375] Electoral Union, to promote the \*objects of that society, and to expose what he deemed to be errors in the church of Rome, and particularly the immorality of the Confessional." The recorder then says he was of opinion that the sale and distribution of the pamphlet would not be a misdemeanour, nor consequently be proper to be prosecuted as such, and upon that ground he quashed the magistrates' order, leaving to this Court the question whether he was right or not. Upon that I understand the recorder to find the facts as follows: He finds that one half of the book was in fact obscene, and he finds that the effect of it would

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be such, that the sale and circulation of it was calculated to prejudice good morals. He does not find that he differs from the justices at all in matter of fact as to that, but he finds that the publication would not be indictable at all as a misdemeanour, and consequently that it would not be proper to prosecute it as a misdemeanour; and his reason for thinking it was not indictable as a misdemeanour is this, that the object of the person publishing was not to injure public morality, but with a view to expose the errors of the Church of Rome, and particularly the immorality, as he thought it, of the Confessional; and, consequently upon those grounds, the recorder held it was not indictable. Then comes the question whether, upon those grounds, the publication was not indictable, and I come to the conclusion that the recorder was wrong, and that it would be indictable. I take the rule of law to be, as stated by Lord ELLENBOROUGH in *Reg v. Dixon*, 3 M. & S. at p. 15, 15 R. R. 384, in the shortest and clearest manner: "It is a universal principle that when a man is charged with doing an act" (that is a wrongful act, without any legal justification) "of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act." And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not a legal excuse, unless the object was such as under the circumstances rendered the particular act lawful. That is illustrated by the same case of *Reg v. Dixon*, 3 M. & S. 11, 15 R. R. 381. The question in that particular case was, whether or not an indictment would lie against a man who unlawfully and wrongfully gave to \*children un- [\*376] wholesome bread, but without intent to do them harm. The defendant was a contractor to supply bread to a military asylum, and he supplied the children with bread which was unwholesome and deleterious, and although it was not shown or suggested that he intended to make the children suffer, yet Lord ELLENBOROUGH held that it was quite sufficient that he had done an unlawful act in giving them bread which was deleterious, and that an indictment could be sustained, as he must be taken to intend the natural consequences of his act. So in the case in which a person carried a child which was suffering from a con-

tagious disease, along the public road to the danger of the health of all those who happened to be in that road, it was held to be a misdemeanour without its being alleged that the defendant intended that anybody should catch the disease: *Reg. v. Vautaudillo*, 4 M. & S. 73, 16 R. R. 389. Lord ELLENBOROUGH said that if there had been any necessity, as supposed, for the defendant's conduct, this would have been matter of defence. If, on the other hand, the small-pox hospital were on fire, and a person in endeavouring to save the infected inmates from the flames, took some of them into the crowd, although some of the crowd would be liable to catch the small-pox, yet, in that case, he would not be guilty of a wrongful act, and he does not do it with a wrong intention, and he would have a good defence, as Lord ELLENBOROUGH said, under not guilty. To apply that to the present case, the recorder has found that one half of this book is obscene, and nobody who looks at the pamphlet can for a moment doubt that really one half of it is obscene, and that the indiscriminate circulation of it in the way in which it appears to have been circulated, must be calculated necessarily to prejudice the morals of the people. The object was to produce the effect of exposing and attacking the Roman Catholic religion, or practices rather, and particularly the Roman Catholic Confessional, and it was not intended to injure public morals: but that in itself would be no excuse whatever for the illegal act. The occasion of the publication of libellous matter is never irrelevant, and is for the jury, and the jury have to consider, taking into view the occasion on which matter is written which might

injure another, is it a fair and proper comment, or is it [ 377 ] not more injurious than the \* circumstances warranted?

But on the other hand it has never been held that the occasion being lawful can justify any libel, however gross. I do not say there is anything illegal in taking the view that the Roman Catholics are not right. Any Protestant may say that without saying anything illegal. Any Roman Catholic may say, if he pleases, that Protestants are altogether wrong, and that Roman Catholics are right. There is nothing illegal in that. But I think it never can be said that in order to enforce your views, you may do something contrary to public morality; that you are at liberty to publish obscene publications, and distribute them amongst every one — schoolboys and every one else — when the inevitable effect must be to injure public morality, on the ground

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that you have an innocent object in view; that is to say, that of attacking the Roman Catholic religion, which you have a right to do. It seems to me that never could be made a defence to an act of this sort, which is in fact a public nuisance. If the thing is an obscene publication, then, notwithstanding that the wish was, not to injure public morality, but merely to attack the Roman Catholic religion and practices, still I think it would be an indictable offence. The question, no doubt, would be a question for the jury; but I do not think you could so construe this statute as to say, that whenever there is a wrongful act of this sort committed, you must take into consideration the intention and object of the party in committing it, and if these are laudable, that that would deprive the justices of jurisdiction. The justices must themselves be satisfied that the publication, such as the publication before them, would be a misdemeanour, on account of its obscenity, and that it would be proper to indict. The recorder has found that the pamphlet is obscene, and he supports the justices in every finding, except in what he has reversed it upon. He finds the object of the appellant in publishing the work was not to prejudice good morals, and consequently he thinks it would not be indictable at all. But I do not understand him for a moment to say, that if he had not thought there was a legal object in view, it would not have been a misdemeanour at all, and that therefore it would have been vexatious or improper to indict it; nor do I think that anybody who looks at this book would for a moment have a doubt upon the matter. That being so, on the question of \* whether or not on the facts that the recorder has found [\*378] it would be a misdemeanour and indictable as such, I come to the conclusion that it is a misdemeanour, and that an indictment would lie; and I say the justices were right, and consequently the recorder's decision is reversed, and the order of justices is confirmed.

MELLOR, J. I confess I have with some difficulty, and with some hesitation, arrived very much at the conclusion at which my Lord and my learned Brothers have arrived. My difficulty was mainly, whether or not this publication was, under the finding of the recorder, within the Act having reference to obscene publications. I am not certainly in a condition to dissent from the view which my Lord and my Brothers have taken as to the recorder's finding, and if that view be correct then I agree with what has



been said by my Lord and my Brother BLACKBURN. The nature of the subject itself, if it may be discussed at all (and I think it undoubtedly may), is such that it cannot be discussed without to a certain extent producing authorities for the assertion that the Confessional would be a mischievous thing to be introduced into this kingdom; and therefore it appears to me very much a question of degree, and if the matter were left to the jury it would depend very much on the opinion which the jury might form of that degree in such a publication as the present. Now, I take it for granted that the magistrates themselves were perfectly satisfied that this work went far beyond anything which was necessary or legitimate for the purpose of attacking the Confessional. I take it that the finding of the recorder is (as I suppose was the finding of the justices below) that though one half of the book consists of casuistical and controversial questions, and so on, and which may be discussed very well without detriment to public morals, yet that the other half consists of quotations which are detrimental to public morals. On looking at this book myself, I cannot question the finding either of the recorder or of the justices. It does appear to me that there is a great deal here which there cannot be any necessity for in any legitimate argument on the Confessional and the like, and agreeing in that view, I certainly am not in a condition to dissent from my Lord and my Brother BLACKBURN, and I know my Brother LUSH agrees entirely with their opinion. [\* 379] Therefore, with the expression \* of hesitation I have mentioned, I agree in the result at which they have arrived.

LUSH, J. I agree entirely in the result at which the rest of the Court have arrived, and I adopt the arguments and the reasonings of my LORD CHIEF JUSTICE and my Brother BLACKBURN.

*Order of justices affirmed.*

#### ENGLISH NOTES.

The rule in the principal case must be read in connection with that in *Reg. v. Tolson*, No. 2, p. 16, *ante*.

The publication, which gave rise to the decision in the ruling case, led to the proceedings in the Court of Common Pleas in *Steele v. Brannan* (1872), L. R., 7 C. P. 261, 41 L. J. M. C. 85, 26 L. T. 509, 20 W. R. 607. The Protestant Electoral Union had published a report of the proceedings in *Reg. v. Hicklin*, in the form of a pamphlet, which a police magistrate had ordered to be destroyed as an obscene publication. Upon a case stated the Court held, following the principal case,

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that the pamphlet, being of such a character as to necessarily tend to the depravation of public morals, was an obscene book within the meaning of 20 & 21 Vict. c. 83, even although the object of those publishing it was to suppress a system which they thought immoral and pernicious; and further, following *Reg. v. Mary Carlile* (1821), 3 B. & Ald. 167, 22 R. R. 338, that the privilege given by the law to reports of judicial proceedings does not extend to reports which contain matter of an obscene and demoralising tendency.

In considering the question of criminal responsibility, it must not be forgotten that a person must be taken to contemplate the reasonable consequence of his acts. This principle was recognised in the ruling case as an element for consideration. To this principle must be referred cases like *Reg. v. Vautondillo* (1815), 4 M. & S. 73, 16 R. R. 389; *Reg. v. Burnett*, (1815) 4 M. & S. 272, 16 R. R. 468. The offence charged in each of those cases was the carrying of persons suffering from small-pox along a public highway to the danger of passers-by, or of persons inhabiting adjacent houses. So where prisoners were indicted for murder, it being alleged that they wilfully set fire to a dwelling-house in which a boy was sleeping, who, in the event, was burnt to death. STEPHEN, J., in his charge said: "I think that, instead of saying that any act done with intent to commit a felony, and which causes death, amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder." *Reg. v. Serné* (1887), 16 Cox, C. C. 311.

## AMERICAN NOTES.

Mr. Bishop cites and approves this case with particularity both in the text and notes of his last edition, 1 Criminal Law, sect. 309 (2), but without citing any analogous American cases. In sect. 923 he observes: "And if one has intentionally published words which the laws declare to be a libel, he can no more urge good motives in defence than the murderer can plead that he killed his victim to render him happy in heaven." The case is also cited in 2 Wharton's Criminal Law, sect. 2544.

Mormon marriages were pronounced unlawful, in *Reynolds v. United States*, 98 United States, 145, although the parties religiously believed them right and sanctioned by divine law.

Miss Susan B. Anthony, the celebrated advocate of "women's rights," was fined for voting at a public election, although she conscientiously believed and claimed that she had a moral and legal right to vote. *United States v. Anthony*, 11 Blatchford (U. S. Circ. Ct.), 200. The Court said: "Miss Anthony knew that she was a woman, and that the Constitution of this State prohibits her from voting. She intended to violate that provision — intended to test it, perhaps, but certainly intended to violate it. There was no ignorance of any fact, but all the facts being known, she undertook to

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settle a principle in her own person. She takes the risk and she cannot escape the consequences. It is said, and authorities are cited to sustain the position, that there can be no crime unless there is a culpable intent, and that to render one criminally responsible a vicious will must be present. A. commits a trespass on the land of B., and B., thinking and believing that he has a right to shoot an intruder upon his premises, kills A. on the spot. Does B.'s misapprehension of his rights justify his act? Would a Judge be justified in charging the jury, that if satisfied that B. supposed he had a right to shoot A., he was justified, and they should find a verdict of not guilty? No Judge would make such a charge. To constitute a crime, it is true that there must be a criminal intent, but it is equally true that knowledge of the facts of the case is always held to supply this intent. An intentional killing bears with it evidence of malice in law. Whoever without justifiable cause intentionally kills his neighbor is guilty of a crime. The principle is the same in the case before us and in all criminal cases. . . . No system of criminal jurisprudence can be sustained upon any other principle."

In the Mormon case above cited Chief Justice WAITE observed: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief or opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. . . . The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion; it was still belief and belief only." Citing *Reg. v. Wagstaff*, 10 Cox Cr. Cas. 531.

In *Commonwealth v. Snelling*, 15 Pickering (Mass.), 337, it was held that in a prosecution for libel, proof that the defendant's purpose was to attack vicious persons and establishments injurious to the morals of the community was inadmissible to rebut the presumption of malice. SHAW, C. J., said: "A man may, by his example and his conduct, be doing great injury to society: he may in fact be guilty of the most ruinous crimes, and that well known to an individual; that individual may be actuated by the most pure and single-hearted desire to rid society of so mischievous a character, and entertain the firmest conviction that he would be doing great good by it; and yet it is very certain that in contemplation of law, any attempt upon his life, his liberty, his person or property, made in the accomplishment of such a purpose, would be unlawful, and therefore malicious. This is founded upon a principle essential to the very existence of a government of laws and of civil liberty, that no one can be punished except by the operation of law, and after a trial according to the forms of law, with such aids and

No. 4. — *Rex v. Charlewood, Leach, C. C. 409. — Rule.*

shields as the rules of law afford him; that individuals cannot take the execution of laws into their own hands; and that it is the duty of every good citizen, if he knows of any offence against society, not to assail the offender, but to bring the matter before the proper tribunals for inquiry, trial, and punishment. . . . He may be actuated by a general good purpose, and have a real and sincere desire to bring about a reformation of manners; but if in pursuing that design he wilfully inflicts a wrong on others which is not warranted by law, such act is malicious.”

In *Commonwealth v. Landis*, 8 Philadelphia, 453, it was held that “even scientific and medical publications, containing illustrations exhibiting the human form, if wantonly exposed in the public markets, with a wanton and wicked desire to create a demand for them and not to promote the good of society by placing them in proper hands for useful purposes, would if tending to excite lewd desires be held to be obscene libels. . . . A mistaken view of the defendant as to the character and tendency of the book, if it was in itself obscene and unfit for publication, would not excuse his violation of the law.”

SECTION III. — *Evidence.*No. 4. — *REX v. CHARLEWOOD.*

(OLD BAILEY SESS. 1786.)

## RULE.

ACTS done subsequently to the commission of an alleged offence, if connected therewith, may be given in evidence to prove the intent or motive.

**Rex v. Charlewood.**

Leach, C. C. 409–489, Case 189 (s. c. 3 R. R. 706).

*Criminal Law. — Evidence. — Proof of Intent or Motive. — Matters arising after Commission of Offence charged.*

To constitute larceny, the felonious intention must exist in the mind at [409] the time the property is obtained; for if it be obtained by fair contract, and afterwards fraudulently converted, it is no felony. If, however, a fraudulent conversion takes place after the privity of contract is determined, it is felony.

At the Old Bailey in February session, 1786, George Charlewood was indicted before Mr. Justice GOULD, present Mr. Baron PERRYNS, for feloniously stealing, on the 4th day of October, 1785, a bay gelding, price £5, the property of John Houseman.



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**No. 4. — *Rex v. Charlewood, Leach, C. C. 410, 411.***


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The prosecutor was a livery-stable keeper in Crown [\*410] Street, " St. Ann's, Soho. On the 4th October, 1785, the prisoner, who was a post-boy, applied to him for a horse in the name of a Mr. Eley, saying, that there was a chaise going to Barnet, and that Mr. Eley wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. The gelding described in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse, and on going out of the stable-yard he met a friend of his, who asked him where he was going; to which he replied that he was going no further than Barnet. He accordingly proceeded towards Tottenham-Court Road, which leads to Barnet, and also, though in some degree circuitously, to Mr. Eley's house. This transaction took place about nine o'clock in the morning, and between three and four o'clock in the afternoon of the same day the prisoner sold the gelding to one Robert Sugden, at the Black Horse, in Lemn Street, Goodman's Fields. The knees of the horse were terribly broken, one of them running blood; and the horse appeared to have been ridden very hard. The price for which the prisoner sold the horse, with the bridle and saddle included, was one guinea and a half; the purchaser almost immediately afterwards sold them to one Johnston for two pounds fifteen shillings.

The Court to the jury: The Judges, in the case of one *Pear*, Leach, Cr. Cas. p. 212, Case 105, 3 R. R. 703, under circumstances similar to the present, have determined that if the jury be satisfied by the facts proved, that a person, at the time he obtains a horse, means to convert it to his own use, it is felony. But between the law of that case and the present there is a distinction so nice that it may seem to common understandings like splitting a hair. As this distinction, however, is adopted by the law, it is my duty to state it to you. If, therefore you should think that the prisoner, at the time he came to hire the horse for the purpose of going to Barnet, really intended to go to Barnet, and proceeded, as it appears by the evidence he did, on his way to that place, it will certainly not be a felonious taking; for to constitute this species of felony you must look to his intention at the very moment when he obtained the gelding: and therefore if he really intended [\*411] to go to Barnet, but \* finding himself in possession of the horse, afterwards hatched the idea of converting it to his own use instead of proceeding to the place to which the horse was

No. 4. — *Rex v. Charlewood, Leach, C. C. 411, 412.* — Notes.

hired to go, it will not amount to a felonious taking.<sup>1</sup> There is, however, another point for your consideration; for although he really went to Barnet, yet he was obliged by the contract to deliver the gelding to the owner upon his return to London; and therefore, if you think that he performed the journey, and returned to London, and instead of delivering the gelding to the owner converted it, after such return, to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would be then over.

The jury found the prisoner guilty upon the first point: That at the time he hired the horse he had an intention to steal it; and this finding bringing the case precisely within  
\* the reason of the determination in the case of *The King* [\* 412] *v. Pear*, the Court thought the point too clear to save the case, and the prisoner received sentence accordingly.

## ENGLISH NOTES.

In *Reg. v. Geering* (1849), 18 L. J. M. C. 215, the prisoner was indicted for the murder of her husband by arsenic. Evidence was tendered on behalf of the prosecution to show that arsenic had been taken, by two sons of the prisoner, and that they died subsequently to the husband, and also by a third son, who did not die. Proof was given of a similarity of the symptoms in the four cases. Evidence was also tendered that the prisoner lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals,

<sup>1</sup> Elizabeth Leigh was indicted at Wells Assizes in the summer of 1800, for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, consisting of a shop containing muslin and other articles mentioned in the indictment, was on fire; and that his neighbours had in general assisted at the time in removing his goods and stock for their security. The prisoner probably had removed all the articles which she was charged with having stolen, when the prosecutor's other neighbours were thus employed; and it appeared that she removed some of the muslin in the presence of the prosecutor and under his observation, though not by his desire. Upon the prosecutor applying to her the next morning, she denied that she had any of the things belonging to him: whereupon he obtained a search-warrant and found his

property in her house, most of the articles artfully concealed in various ways. But it was suggested that she originally took the articles with an honest purpose, as her neighbours had done, and that she would not otherwise have taken some of them in the presence and under the view, of the prosecutor; and that therefore the case did not amount to felony. The jury, from the observations they received from the Court, found her guilty; but said, that in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And upon a reference to the Judges in Michaelmas Term, 1800, all (absent LAWRENCE, J.) held the conviction wrong: for that if the original taking were not with intention to steal, subsequent conversion was no felony, but a breach of trust.

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and distributed them to the four parties. This evidence was objected to on behalf of the prisoner, but the objection was overruled by POLLOCK, C. B. The evidence relating to the deaths or sickness was admitted to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. As regards the remaining portion of the evidence the learned judge said: "The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony." This ruling was concurred in by ALDERSON, B., and TALFOURD, J., and the CHIEF BARON refused to reserve the point for the consideration of the Court of Crown Cases Reserved.

As recent cases relating to larceny, and the evidence of acts done subsequently for the purpose of establishing guilt, may be cited *Reg. v. Ashwell* (C. C. R. 1885), 16 Q. B. D. 190, 55 L. J., M. C. 63, 53 L. T. 773, 34 W. R. 297, 16 Cox, C. C. 1, and *Reg. v. Flowers* (C. C. R. 1886), 16 Q. B. D. 643, 55 L. J. M. C. 179, 54 L. T. 547, 34 W. R. 367, 16 Cox, C. C. 33.

Matters preceding the commission of an alleged offence may also be given in evidence, for the purpose of proving the intent. Thus in *Reg. v. Ball* (1808), 1 Camp. 324, Russ. & Ry. 132, 10 R. R. 695, the prisoner was indicted for uttering a forged Bank of England note. After proof had been given of the forgery, and uttering, with a view to prove guilty knowledge, evidence was tendered and admitted that the prisoner had a short time previously uttered another forged note of the same manufacture, and had circulated others of the same manufacture, with his handwriting on the back of them. The prisoner was found guilty, but sentence was respited for the purpose of obtaining the opinion of the twelve judges, who held that the evidence was receivable for the purpose of proving guilty knowledge. The limits of the rule are thus stated by COLERIDGE, C. J., in *Reg. v. Gibson* (C. C. R. 1887), 18 Q. B. D. 537, 56 L. J. M. C. 49, 56 L. T. 367, 35 W. R. 411, 16 Cox, C. C. 181: "Acts done by a prisoner of the same character as the act charged in the indictment, are, within reasonable limits, admissible in evidence in order to prove his guilty knowledge." The case of *Rex v. Ball* confirms the previous ruling in *Rex v. Wyllie* (1804), 1 Bos. & P. (N. R.) 92, 2 Leach, C. C. 983.

In *Reg. v. Garner* (1864), 3 F. & F. 681, upon an indictment for poisoning, WILLES, J., after consulting POLLOCK, C. B., admitted evidence that the prisoner had previously poisoned other persons. Again

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in *Reg. v. Francis* (1874), L. R. 2 C. C. R. 128, 43 L. J. M. C. 97, 30 L. T. 503, 22 W. R. 663, 12 Cox, C. C. 612, the prisoner was indicted for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring. The Court of Crown Cases Reserved held that evidence was properly admitted, that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and endeavoured to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not so.

A similar point was involved in a civil case arising out of the Roupell forgeries. *Roupell v. Haws* (1863), 3 F. & F. 784.

It is enacted by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112) s. 19: "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him." In *Reg. v. Carter* (C. C. R. 1884), 12 Q. B. D. 522, 53 L. J. M. C. 96, 50 L. T. 432, 596, 32 W. R. 663, 15 Cox, C. C. 448, the prisoner was indicted for receiving a mare knowing it to have been stolen. Evidence was tendered and admitted that another mare, for the theft of which a man had been convicted, had been in the possession of and disposed of by the prisoner within the twelve months preceding the hearing of the charge. The Court held that the evidence was inadmissible, as the property was not "found in the possession" of the prisoner, and that the conviction must be quashed. The distinction between such cases as *Reg. v. Carter* and *Reg. v. Francis, supra*, is somewhat fine.

The same section 19 further enacts: "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall



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not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused." With the exception of the proviso, the section is a substantial re-enactment of 32 & 33 Vict. c. 99, s. 11. The proviso in the earlier Act ran: "provided that not less than seven days' notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary." The effect of the provisions of the earlier act were considered in *Reg. v. Davis* (C. C. R. 1870), L. R., 1 C. C. R. 272, 39 L. J. M. C. 135. The head note in the Law Reports states that the service of the notice and proof of a previous conviction does not relieve the prosecution from the necessity of proving that the prisoner knew that the goods had been stolen, but the body of the report hardly bears this out. When we turn to the Law Journal it is clear that no such question was decided. The real question was whether the jury were rightly directed by the Commissioner of Assize, who told the jury that the legislature must be taken to have intended that the notice should have the operation which, upon the face of it, it purported to have, and that the prisoner ought to be deemed to have known such goods to be stolen, until he proved the contrary. The judgment of the Court, which is omitted from the Law Reports, is thus given in the Law Journal. "KELLY, C. B. This conviction must be quashed. There is no enactment in the statute to give the notice the effect it purported to have, and to throw the *onus* of proof of absence of guilty knowledge on the prisoner." Notwithstanding the case of *Rex v. Davis* and the omission of the words in the proviso on which the ruling of the Commissioner of Assize was founded, it still seems to be the reasonable construction of the Act to say that the proof of the matters contained in the notice, affords *prima facie* evidence of guilty knowledge which the jury are at liberty to accept or reject.

## AMERICAN NOTES.

"Other criminal acts may not be proved, unless they are part of the same series, or otherwise connected with the one charged. *State v. La Page*, 57 New Hampshire, 215; 24 Am. Rep. 269; *Shaffner v. Com.*, 72 Pennsylvania State, 60; 13 Am. Rep. 649; *People v. Sharp*, 107 New York, 427; 1 Am. St. Rep. 851; *Com. v. Robinson*, 146 Massachusetts, 571. But evidence of a *subsequent* distinct criminal act, connected in purpose and character with the offence charged, is admissible. *Kramer v. Com.*, 87 Pennsylvania State, 299. As on a trial for arson, an attempt shortly after by the prisoner to burn the same building; or on a trial for adultery, other acts of adultery about the same time between the same parties; or in embezzlement, other embezzlements, for the purpose of showing guilty knowledge; or on a trial for murder, an attempt, shortly afterward, to slay the mother of the deceased, who

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had been present and witnessed the murder. *Com. v. Nichols*, 114 Massachusetts, 285; 19 Am. Rep. 346; *Lefforge v. State*, 129 Indiana, 551; *People v. Gray*, 66 California, 271; *Killins v. State*, 28 Florida, 313." Browne on Criminal Law, 20, 21.

In *Pierson v. People*, 79 New York, 424; 35 Am. Rep. 524, the People gave evidence showing an intimacy between Mrs. W. and the prisoner, a married man, before and after the death of W. the murdered man, her husband, and that the prisoner disappeared from his home February 19, 1877, eleven days after the death of W. The prosecution then called B. a clergyman, who resided in Michigan, who testified that the prisoner called at his residence, with Mrs. W., February 26, 1877, and then and there swore that there was no legal objection to his marriage, and B. then married them. Held competent as showing motive, although it then tended to prove another crime.

In *Com. v. White*, 145 Massachusetts, 392, on a trial for passing counterfeit money, evidence was admitted that the prisoner passed similar bills subsequently, in a continuous series, knowing them to be false. See *People v. Everhardt*, 104 New York, 395.

But in *Farris v. People*, 129 Illinois, 521; 4 Lawyers' Rep. Annotated, 582, it was held, on a trial for murder, that evidence that the prisoner committed rape upon the wife of the murdered man within half an hour after the murder, was incompetent, because there was no logical connection between the two crimes, from which it could be said that one tended to establish the other. And in *Parkinson v. People*, 135 Illinois, 401; 10 Lawyers' Rep. Annotated, 91, on a trial for rape, evidence of another rape by the prisoner upon the same woman several days afterward was deemed incompetent. So on an indictment for deadly assault on A. previous threats against B. are not admissible in evidence. *Ogletree v. State*, 28 Alabama, 693.

See 1 Bishop on Criminal Procedure, sect. 1065; *Mason v. State*, 42 Alabama, 532; *State v. Harrold*, 38 Missouri, 496; Wharton on Criminal Law, sect. 648, *et seq.*

In *Killins v. State*, 28 Florida, 313, on a trial for murder, where the defendant, immediately after slaying the deceased, proceeded to shoot at, chase, threaten and endeavor to kill the mother of the deceased, who was present and witnessed the killing, such subsequent acts and threats were admitted in evidence as part of the *res gestæ* and to show the *animus* of the defendant, "furnishing a strong presumption that they were the two that he had premeditatedly determined to kill."

In *Thayer v. Thayer*, 101 Massachusetts, 111, an action of divorce for adultery, proof was allowed of subsequent acts of adultery between the parties to characterize the nature of the intercourse at the time charged. The Court consider the rule the same in both civil and criminal proceedings, and observed: "It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it." "The fact that the conduct relied on has occurred since the filing of the libel does not exclude it."

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On an indictment for passing forged bank notes, evidence of a subsequent uttering is not admissible unless shown to have been connected with the former or the notes were of the same manufacture. *Dibble v. People*, 4 Parker Criminal Rep. (New York), 199.

In *Britt v. State*, 9 Humphreys (Tennessee), 31, an indictment for false pretences, proof was allowed of an obtaining money by similar pretences from the same person on the next day.

In *Hope v. People*, 83 New York, 418; 38 Am. Rep. 460, the defendant was indicted for robbery of bank keys from the person of a cashier. Evidence that he and his confederates subsequently used the keys in opening and robbing the bank was admitted.

In *State v. Myers*, 82 Missouri, 558, an information for feloniously obtaining money by trick, evidence of other instances of the offence on the same day both before and afterwards was approved. The subject is very learnedly reviewed.

In *Horn v. State*, 98 Alabama, 23, the prosecuting witness testified that defendant assaulted him and drew a pistol, whereupon he ran, and was struck by a pistol ball, but did not see who discharged the pistol. Held, that he might further testify that looking round, immediately after being shot, he saw defendant shoot at his wife and try to shoot his clerk, as this tended to prove that defendant shot witness.

On a trial for larceny, evidence of an accomplice that after the return of himself and defendant to the latter's house with the stolen goods, they went out again the same night and stole other goods, is inadmissible. *State v. Kelley*, 65 Vermont, 533, a very excellent review of the cases.

On a prosecution for theft of a saddle, evidence that defendant, who was in possession of the saddle and a stolen horse, when approached by the sheriff, began firing before being spoken to, and killed one of the posse, is admissible. *Willingham v. State*, 33 Texas Criminal Appeals, 98.

On a prosecution for embezzlement, proof that defendant, two months afterward, embezzled another sum from the complainant, is not admissible. *People v. Hill* (California), 34 Pacific Reporter, 854. See *Nixon v. State*, 31 Texas Criminal Appeals, 205.

As to prior criminal acts, it is held that they must be connected with the one in question, and not merely acts of the same nature. See *Commonwealth v. Tuckerman*, 10 Gray (Massachusetts), 173. So in *State v. La Pege, supra*, it was held that evidence of prior attempts to commit rape on other women was not competent to show the prisoner's proclivity. So in *People v. Sharp, supra*, an indictment for bribery of common councilmen of the city of New York, evidence of bribery of the clerk of the State Legislative Assembly, several years before, was held improper, although the general object was the same. PECKHAM, J., gives a useful review of the chief authorities on this point. Consult *Strong v. State*, 86 Indiana, 208; 44 Am. Rep. 292, and note, 299; *State v. Weldon*, 39 South Carolina, 318; 24 Lawyers' Rep. Annotated, 126. In *Shayiner v. Com., supra*, an indictment for murder of the prisoner's wife by poison, there was evidence of a criminal intimacy of the prisoner with the wife of S., whose life insurance the prisoner tried to collect; but evidence

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that S. died of poison and was attended by the prisoner was held inadmissible. But it is competent, on a trial for rape, to show a previous attempt by the defendant to commit rape on the same woman. *People v. O'Sullivan*, 104 New York, 481; 58 Am. Rep. 530. And on a trial for arson to prove a prior attempt to burn the same buildings. *Com. v. McCarthy*, 119 Massachusetts, 354. And on a trial for adultery, to show previous improper familiarities between the prisoner and the same woman. *Com. v. Merriam*, 14 Pickering (Mass.), 518; 25 Am. Dec. 420. On a trial for murder by drowning the deceased in a boat, evidence that defendant had previously tried to poison the deceased is admissible to show *animus* and intent, and to rebut the theory of accident. *Nicholas v. Commonwealth* (Va.), 21 S. E. Rep'r, 364. And on a trial for false pretences evidence of similar transactions about the same time, and even before, with other parties, is competent, to prove intent. *Mayer v. People*, 80 New York, 364; *People v. Shulman*, *id.* 374, note. And so of receiving stolen goods. *Copperman v. People*, 56 New York, 591. See a valuable note, 1 Greenleaf on Evidence, (15th ed.) p. 88. As to the rule in civil cases, see *McCusker v. Enright*, 64 Vermont, 488; 33 Am. St. Rep. 938, and note, 939.

On a trial for murder it is improper to allow a cross-examination of the accused with a view to proving his adultery with a woman other than the wife of the deceased many years before, the motive for the murder being alleged to be adulterous intimacy with the wife of the deceased. *State v. Reed*, 53 Kansas, 767; 42 Am. St. Rep. 323.

In *Lefforge v. State*, 129 Indiana, 551, it was held on a trial for incest, that the State might prove acts of sexual intercourse previous to the specific act charged.

In *State v. Bridgman*, 49 Vermont, 202; 24 Am. Rep. 124, evidence of improper familiarity and adultery between the parties both before and after the offence charged, was held admissible. The point was discussed at length. The same is held in *Commonwealth v. Nichols*, 114 Massachusetts, 285; 19 Am. Rep. 346, as to other acts "near" to the time of the one charged.

The test of the admissibility of evidence of other crimes is thus expressed in *Shaffner v. Commonwealth*, 72 Pennsylvania State, 65: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other."

In *Jansen v. People*, Supreme Court of Illinois, 42 Cent. Law Journal, 351, on the trial of defendant for rape alleged to have been committed on the person of his daughter, a girl twelve years old, it was held error to admit, for any purpose, evidence of a like offense subsequently committed by him on the person of another daughter. But in *Proper v. State*, 85 Wisconsin, 628, a case of rape, evidence was allowed that the defendant got into bed with the prosecutrix and an older girl, on another occasion, and then had intercourse with the latter.



## No. 5. — REG. v. THOMPSON.

(C. C. R. 1893.)

## RULE.

A CONFESSION, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence by a person in authority.

## Reg. v. Thompson.

1893, 2 Q. B. 12-19 (s. c. 62 L. J. M. C. 93, 69 L. T. 22, 41 W. R. 525).

*Criminal Law. — Evidence. — Confession. — Admissibility.*

[12] In order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such confession was free and voluntary, that is, was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed.

The prisoner was tried for embezzling the money of a company. It was proved at the trial that, on being taxed with the crime by the chairman of the company, he said, "Yes, I took the money," and afterwards made out a list of the sums which he had embezzled, and with the assistance of his brother paid to the company a part of such sums. The chairman stated that at the time of the confession no threat was used, and no promise made as regards the prosecution of the prisoner, but admitted that, before receiving it, he had said to the prisoner's brother, "It will be the right thing for your brother to make a statement," and the Court drew the inference that the prisoner, when he made the confession, knew that the chairman had spoken these words to his brother:

*Held*, that the confession of the prisoner had not been satisfactorily proved to have been free and voluntary, and that therefore evidence of the confession ought not to have been received.

Case stated by the acting chairman of quarter sessions for the county of Westmoreland.

At the Westmoreland Quarter Sessions, held at Kendal on October 21, 1892, Marcellus Thompson was tried for embezzling certain moneys belonging to the Kendal Union Gas and Water Company, his masters. Mr. Crewdson, the chairman of the com-

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pany, at whose instance the warrant for the prisoner's apprehension had been issued, was called as a witness by the prosecution to prove, amongst other things, a confession by the prisoner.

As soon as this confession was sought to be put in evidence, objection was taken to its admissibility, and we therefore, before receiving further proof, allowed the witness to be cross-examined by the prisoner's counsel. In answer to the latter's questions the witness stated that, prior to the confession being made, \* the prisoner's brother and brother-in-law had come to see [\* 13] him, and that at this interview he said to the prisoner's brother, "It will be the right thing for Marcellus to make a clean breast of it." The witness added, "I won't swear I did not say 'It will be better for him to make a clean breast of it.' I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken." No evidence was produced to the Court tending to prove that the details of the interview had been communicated to the prisoner, or to rebut the evidence of Mr. Crewdson as to what took place at the interview.

It was then contended by the prisoner's counsel, that the above statements to the prisoner's brother were inducements to the prisoner to confess held out by a person in authority, and that evidence of the confession was therefore inadmissible.

We found that Mr. Crewdson was a person in authority, and we found as a fact, that the statements made by him were calculated to elicit the truth, and that the confession was voluntary, and we accordingly admitted the evidence.

The witness then proved that after the interview he charged the prisoner with embezzling the company's moneys, and one of the directors told the prisoner he was in a very embarrassing position. The prisoner replied, "I know that; I will give the company all the assistance I can." He said, in answer to witness's charge, "Yes, I took it; but I do not think it is more than £1000. It might be a few pounds more." No statement was made to the prisoner that the confession would save him from prosecution; there was no threat or promise.

Subsequently the prisoner made out a list of moneys which he

admitted had not been accounted for by him. This list we also admitted in evidence.

The prisoner was convicted and sentenced to three years' penal servitude.

The question for the opinion of the Court is whether the evidence of the confession was properly admitted.

[\* 14] \* The case having been sent down for amendment, the following statement was added:—

At a meeting of the directors a question was asked by one of the directors as to the value of the stock on a farm occupied by the prisoner's brother, and it was suggested that a bill of sale over the stock should be given. The prisoner stated that the worth of the stock was over £1000, but that he could not accept the suggestion about the security without telling his brother. At the same meeting the prisoner said, "My brothers have got it" (meaning the money): "It has gone to pay interest on mortgages." Mr. Crewdson said, "I never agreed not to prosecute, if a bill of sale were given."

After the charge was made, £340 was received from the prisoner, together with some money and an I O U for £25, which were found in the cash box. Of the sum £340, £90 was paid into the bank by the prisoner, and £250 by his brother. Mr. Crewdson stated that no arrangement was made as to the discrepancy being treated as a debt, and that the sum paid was simply by way of restitution.

Shee, Q. C., and Cavanagh, for the prisoner. Evidence of the confession was not admissible. In the absence of proof by the prosecution that it was voluntary, evidence of a confession cannot be received: *Reg. v. Baldry*, 2 Den. C. C. 430, 21 L. J. M. C. 130; *Reg. v. Warringham*, 2 Den. C. C. 447 n. Here no such proof was given. It has been repeatedly held that proof of the use of such an expression as "it is better to tell the truth" by a person in authority excludes evidence of a confession: *Reg. v. Gillis*, 11 Cox, C. C. 69; *Reg. v. Garner*, 1 Den. C. C. 329; *Reg. v. Bate and others*, 11 Cox, C. C. 686; *Reg. v. Doherty*, 13 Cox, C. C. 23; *Reg. v. Fennell*, 7 Q. B. D. 147, 50 L. J. M. C. 126. The finding that the words were "calculated to elicit the truth" shows that they operated as an inducement, by conveying to the accused that he would find it advantageous to admit his guilt. A confession shown to have been brought about by such an induce-

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ment cannot be proved (3 Russell on Crimes, pp. 441, 442, 5th ed).

Segar (with him, C. M. Wilson), for the prosecution. Evidence \* of the confession was admissible. It is not [\* 15] shown that what passed between the prisoner's brother and the prosecutor was communicated to the prisoner. The words used were also advice on moral grounds. Confessions preceded by exhortations of this kind were held admissible in *Reg. v. Jarvis*, L. R., 1 C. C. R. 96, and *Reg. v. Reeve*, L. R., 1 C. C. R. 362.

The justices have found that the confession was voluntary, and it was for them to decide what words were used, and whether they were repeated to the prisoner in such a manner as to convey a promise or threat. Evidence of a confession is *prima facie* admissible, and can only be excluded upon proof by the prisoner that the confession was not voluntary.

[They also cited *Rex v. Court*, 7 C. & P. 486; *Reg. v. Moore*, 2 Den. C. C. 522; and *Rex v. Clewes*, 4 C. & P. 221.]

Shee, in reply.

*Cur. adv. vult.*

April 29. The following judgment was read by

CAVE, J. The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in a number of cases both at petty and quarter sessions; and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted.

Many reasons may be urged in favour of the admissibility of all confessions, subject, of course, to their being tested by the cross-examination of those who heard and testify of them, and Bentham seems to have been of this opinion (*Rationale of Judicial Evidence*, Bk. v. ch. vi. s. 3). But this is not the law of England. By that law, to be admissible a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear excited by a person in authority, it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his *Law of Evidence* (8th ed. Pt. 2, ch. xv. s. 872): "Before any confession can be received in \* evidence in a criminal [\* 16] case, it must be shown to have been voluntarily made; for,



to adopt the somewhat inflated language of EYRE, C. B., 'A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.' *Warickshall's Case*, 1 Leach, C. C. R. 263, 4th ed. The material question, consequently, is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the Judge, who will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement, and who in the event of any doubt subsisting on this head, will reject the confession."

The case cited for this position is *The Queen v. Warringham*, 2 Den. C. C. 447, n. The report is from the MS. note taken by PARKE, B., at the trial at the Surrey Spring Assizes in 1851, where PARKE, B., says to the counsel for the prosecution, "You are bound to satisfy me that the confession which you seek to use against the prisoner was not obtained from him by improper means. I am not satisfied of that; for it is impossible to collect from the answers of this witness whether such was the case or not." PARKE, B., adds: "I reject the evidence of admission, not being satisfied that it was voluntary." In *Reg. v. Baldry*, 2 Den. C. C. 430, at p. 442, 21 L. J. M. C. 130, it is said by POLLOCK, C. B., that the true ground of the exclusion is, not that there is any presumption of law that a confession not free and voluntary is false, but that "it would not be safe to receive a statement made under any influence or fear." He also explains that the objection to telling the prisoner that it would be better to speak the truth is that the words import that it would be better for him to say something. With this view the statutory caution agrees, which commences with the words, "You are not obliged to say anything unless you desire to do so." See *Indictable Offences Act, 1848* (11 & 12 Vic. c. 42), s. 18.

These principles are restated and affirmed by the present LORD CHIEF JUSTICE in *Reg. v. Fennell*, 7 Q. B. D. 147, at [\*17] p. 150, in the following words: \* "The rule laid down in *Russell on Crimes* [vol. iii. bk. vi. c. iv. p. 441] is that a confession, in order to be admissible, must be free and voluntary, — that is, must not be extracted by any sort of threats or vio-

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lence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. It is well known that the chapter in Russell on Crimes containing that passage was written by Sir E. V. Williams, a great authority upon these matters."

If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary,—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

In the present case the magistrates appear to have intended to state the evidence which was before them, and to ask our opinion whether, on that evidence, they did right in admitting the confession. Now, there was obviously some ground for suspecting that the confession might not have been free and voluntary; and the question is whether the evidence was such as ought to have satisfied their minds that it was free and voluntary. Unfortunately, in my judgment, the magistrates do not seem to have understood what the precise point to be determined was, or what evidence was necessary to elicit it. The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected that what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that after Mr. Crewdson's statement that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner's making a clean breast of it with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether \* any, and, [\* 18] if so, what, communication was actually made to the prisoner before the magistrates could properly be satisfied that the confession was free and voluntary.

The magistrates go on to say that they inferred that the details of the interview would be, by which, I suppose, they intend to say that they inferred they were, communicated to the prisoner, which

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seems to have been the right inference to draw under the circumstances. They add that they found as a fact that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary. The first of these findings, if the ruling of POLLOCK, C. B., in *Reg. v. Baldry*, is, as I take it to be, correct, is entirely immaterial. The second finding, if it is a corollary from the first, does not follow from it, and, if it is an independent finding, is not warranted by the evidence; and, as the question for us is whether this finding was warranted by the evidence, I feel compelled to say that, in my judgment, it was not. Taking the words of Mr. Crewdson to have been, "It will be the right thing for Marcellus to make a statement," and that those words were communicated to the prisoner, I should say that that communication was calculated, in the language of POLLOCK, C. B., to lead the prisoner to believe that it would be better for him to say something. All this, however, is matter of conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation.

I would add that, for my part, I always suspect these confessions which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, — a desire which

vanishes as soon as he appears in a Court of justice. In [<sup>\*</sup> 19] this <sup>\*</sup> particular case there is no reason to suppose that

Mr. Crewdson's evidence was not perfectly true and accurate; but on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. In my judgment no other principle can be safely worked by magistrates.

LORD COLERIDGE, C. J., HAWKINS, DAY, and WILLS, JJ., concurred.

*Conviction quashed.*

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## ENGLISH NOTES.

The principal case has been chosen as the latest and most authoritative on the much vexed question of the admissibility of confessions. The subject is not an easy one, as the cases frequently depend upon mere verbal distinctions.

It may be stated generally that where a prisoner is merely exhorted to tell the truth, and no hope is held out that the punishment will in consequence be mitigated, any confession thereupon made will be admissible. The following are the more important decisions in which the confession was held admissible.

The prisoner committed on a charge of murder sent for the chaplain to pray with him. The chaplain told him as a minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair so far as he could any injury he had done. The chaplain had two interviews with the prisoner, and considered he made a great impression upon him, but distinctly told him, he did not wish him to confess. After this the prisoner made two confessions to the gaoler and the mayor, after having been warned by both those persons of the consequences. *Rex v. Gilham* (1828), Car. C. L. 51, 1 Mood. C. C. 186.

A prisoner charged with theft from his employers was called up by one of the firm of employers, who said: "Jarvis, I think it right that I should tell you, that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you, you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." After the prisoner had denied having written a letter produced to him, the employer added: "Take care Jarvis, we know more than you think we know." *Reg. v. Jarvis* (C. C. R. 1867), L. R., 1 C. C. R. 96, 37 L. J. M. C. 1, 17 L. T. 178, 16 W. R. 111, 10 Cox, C. C. 575.

A prisoner taken into custody by a policeman on a charge of arson was given by him into the charge of a married daughter of the prisoner's master, to enable the prisoner to change her clothes. The daughter said to the prisoner: "Jane, I am very sorry for you, you ought to have known better; tell me the truth, whether you did it or no." The prisoner said: "I am innocent." The daughter then said: "Don't run your soul into sin, but tell the truth." The confession, which the prisoner thereupon made, was held admissible on two grounds, first, that no inducement had been held out, and secondly, because the daughter was not a person in authority. *Reg. v. Slee-*



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*man* (C. C. R. 1853), 23 L. J. M. C. 19, 6 Cox, C. C. 245, 17 Jar. 1082.

Two prisoners, one aged 8 and the other a little older, while in the presence of their mothers and a policeman, after their apprehension, were thus admonished by one of the mothers: "You had better, as good boys, tell the truth." Their confession was held admissible. *Reg. v. Reece* (1872), L. R., 1 C. C. R. 362, 41 L. J. M. C. 92, 26 L. T. 403, 20 W. R. 631, 12 Cox, C. C. 179.

As an example of a case falling the other side of the line, may be mentioned *Reg. v. Fennell* (C. C. R. 1881), 7 Q. B. D. 147, 50 L. J. M. C. 126, 44 L. T. 687, 29 W. R. 742, 14 Cox, C. C. 607, which is cited in the principal case. The prisoner, Fennell, was taken to a room with the prosecutor and an inspector of police. The prosecutor then said to the prisoner: "He (meaning the inspector) tells me you are making house-breaking implements; if that be so you had better tell the truth, it may be better for you." This statement was held to amount to an inducement.

The admissibility of confessions following upon an offer by the government to reward or pardon accessories, depends upon the question whether the hope of the reward or pardon was the primary or principal inducement which led the prisoner to confess. One of several persons in custody on a charge of murder told the prison chaplain, that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon. The chaplain said that there had, but he hoped that the prisoner would understand that he could offer him no inducement to make any statement, as it must be his own free and voluntary act. When the prisoner saw the magistrate, he said that no person had held out any inducement to him to confess anything, and that what he was about to say was his own free and voluntary act and desire. The confession which the prisoner made to the magistrate was admitted on his trial for murder. *Reg. v. Dingley* (1845), 1 Car. & K. 637. Where a distinct intimation was given to a prisoner that the Secretary of State could not advise his pardon, his subsequent confession was admitted. *Reg. v. Clewes* (1830), 4 Car. & P. 221. Where it appeared that the prisoner had stated, on the night preceding his confession, that he saw no reason why he should suffer for the crime of another, and that as the government had offered a free pardon to any one concerned who had not struck the blow, he would tell all he knew about the matter, his confession was ruled to be inadmissible, and the judge struck an entry which he had made of it, on the assumption that it was admissible, off his notes. *Reg. v. Boswell* (1842), Car. & M. 584. In *Reg. v. Blackburn* (1853), 6 Cox, C. C. 333 TALFOURD, J., after consulting WILLIAMS, J., rejected a confes-

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sion made by a prisoner, after he had seen a handbill offering a reward, and who was under the impression that he would be admitted as a witness for the Crown.

A married daughter of the prosecutor, but who did not live in the prosecutor's house, was held not to be a person in authority: *Reg. v. Sleeman* (C. C. R. 1853), 23 L. J. M. C. 19, 6 Cox, C. C. 245, 17 Jur. 1082. But the wife of one of two partners, and who assisted in the management of the business, was held to be a person in authority: *Reg. v. Warringham* (1851), 2 Den. C. C. 447, n., 15 Jur. 318, *per* PARKE, B.

In *Reg. v. Moore* (C. C. R. 1852), 21 L. J. M. C. 199, 2 Den. C. C. 522, 5 Cox, C. C. 555, 16 Jur. 621, the prisoner was indicted for the murder of her infant child. A surgeon had been sent for to attend her, but before he came, the mistress of the house, who was a married woman, told her she had better speak the truth. The prisoner said she would tell it to the surgeon. The confession she made to the surgeon in the presence of the mistress was held to be admissible. The following observations of PARKE, B., who delivered the judgment of the Court, contain a useful exposition of principle: "A rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate or constable is such a person, and so the master or mistress may be. If not held out by one in authority, the confession is clearly admissible. . . . But on referring to the cases where the master or mistress have been held to be persons in authority, it will be found that it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. . . . In *Reg. v. Warringham*, (*supra*), . . . the confession was in consequence of what was said by the mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my note."

*Reg. v. Moore* has apparently resolved the doubt mentioned by PARKE, B., in *Reg. v. Spencer* (1837), 4 Car. & P. 776: "There is a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by a person in authority, is receivable." In *Reg. v. Taylor* (1839), 8 Car. & P. 733, a confession made at the instigation of a person not in authority in the presence of a person in authority, who, to use the language of PATTISON, J., "must, as she expressed no dissent, be taken to have sanctioned the inducement," was held not admissible.

The practice of some police officers to put questions to persons whom

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they have in their custody for the purpose of ensuring sufficient evidence to obtain a conviction, was the subject of severe strictures by A. L. SMITH, J., in *Reg. v. Garin* (1885), 15 Cox, C. C. 656, and by CAVE, J., in *Reg. v. Male* (1893), 17 Cox, C. C. 689. Both these learned judges rejected statements made by prisoners to policemen in the cases cited. In *Reg. v. Brackenbury* (1893), 17 Cox, C. C. 628, DAY, J., dissented from the decision in *Reg. v. Garin*. As is pointed out in a note to *Reg. v. Garin* the view there expressed seems a distinct departure from *Rex v. Thornton* (1824), 1 Moo. C. C. 27, but is justified by such a case as *Rex v. Sheppard* (1837), 7 Car. & P. 579, where a constable who apprehended a prisoner asked him what he had done with the tap he had stolen from the prosecutor's premises; and said, "You had better not add a lie to the crime of theft." The confession thereupon made to the constable was rejected. The observations of PARKE, B., in *Reg. v. Moore, supra*, also point to the general inadmissibility of answers to questions put by police officers.

The Judge, and not the jury, must determine whether a confession is voluntary. *Reg. v. Moore, supra*.

## AMERICAN NOTES.

The statement in the Rule precisely corresponds with the law in this country. To cite authorities would seem almost superfluous. The doctrine is laid down in 1 Greenleaf on Evidence, sect. 379; 1 Bishop on Criminal Procedure, 3rd ed. sect. 1164; *Hamilton v. People*, 29 Michigan, 173; *Com. v. Knapp*, 10 Pickering (Mass.), 477; 20 Am. Dec. 534; *Murray v. State*, 25 Florida, 528; *Craig v. State*, 30 Texas Appeals, 619; *People v. Chaplean*, 121 New York, 266; *Lyons v. People*, 137 Illinois, 602; *State v. Howard*, 35 South Carolina, 197; *State v. Morgan*, 35 West Virginia, 260; *Bubster v. State*, 33 Nebraska, 663; *Green v. State*, 88 Georgia, 516; 30 Am. St. Rep. 167; *Daniels v. State*, 78 Georgia, 98; 6 Am. St. Rep. 238, and note, 242; *Nolen v. State*, 14 Texas Appeals, 474; 46 Am. Rep. 247; *Heldt v. State*, 20 Nebraska, 492; 57 Am. Rep. 835.

Different Courts however hold variant views as to what constitutes implied promises or hopes held out, and many Courts justify falsehood and artifice in the detection of crime. Thus in *Heldt v. State, supra*, a detective obtained a confession from the defendant under arrest, by pretending to be under arrest for the same crime, proposing to him to consult an attorney for both, and pretending that he had consulted an attorney who advised that "the prisoner had better tell the facts, and they would be likely to do him as much good as anything he could do, — that there was no use in lying about it, and he had better tell the truth." Held admissible. The Court said: —

"A man who will deliberately ingratiate himself into the confidence of another for the purpose of betraying that confidence, and with words of friendship on his lips seeks by every means in his power to obtain an admission which can be tortured into a confession of guilt, which he may blazon to

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the world as a means to accomplish the downfall of one for whom he professes great friendship, cannot be possessed of a very high sense of honor or of moral obligation. Hence the law looks with suspicion on the testimony of such witnesses, and the jury should be specially instructed that in weighing their testimony greater care is to be exercised than in the case of witnesses wholly disinterested. *Percut v. People*, 5 Nebraska, 377. The weight to be given to such evidence is a question for the jury and cannot be urged against its admissibility.

"The confession however seems to have been voluntary, although made to one who deliberately and repeatedly deceived and made false statements to obtain it. It is doubtful if anything is really gained in the administration of the law from the admission of such testimony and the consequent encouragements of the courts of the practice. If it is answered that confessions are thus obtained which otherwise could not be had, it may be said in reply that the same is true of the rack and the wheel, by means of which confessions were formerly forced from their victims, but which experience showed were entirely unreliable. So far as appears, the plaintiff confided in this man as his friend, and was betrayed by this professed benefactor. The testimony of such a man may be entitled to but very little credence, yet it must be submitted to the jury."

Doubtless such means are commonly resorted to by police agents and are generally upheld by the Courts on the ground of necessity, although deprecated on views of strict morality and personal honour. A very experienced detective recently testified on a very remarkable murder trial, in which the chief evidence was confessions, that he had frequently lied in order to obtain confessions, and that he never would hesitate to do so to promote the discovery of guilt. This resource however was very pointedly condemned in a dissenting opinion in *People v. Barker*, 60 Michigan, 277; 1 Am. St. Rep. 501, where a Pinkerton detective assumed the rôle of counsel for the accused in jail, and got a confession from him. This was admitted, but MORSE, J., said: "A more shameful and disgraceful method of depriving men accused of any opportunity of employing counsel and acting under their advice: a more oppressive and deceitful course of conduct to prevent their enjoyment of their constitutional privileges, and a more mean and wicked betrayal of their rights under the law by these two officials, I have never read in the history of American jurisprudence. It seems like going back into the dark ages of the administration of criminal law." (See note 57 Am. Rep. 839.) This was unquestionably a very extreme case, but the "Molly Maguire" murderers in Pennsylvania, of whom a score were executed, were detected only by the agency of one of Pinkerton's men who joined the gang and testified to their acts and confessions. Such artifices are generally justified in the American Courts. See *State v. Phelps*, 74 Missouri, 128. In *State v. Brooks*, 92 Missouri, 542, a detective had himself indicted and imprisoned for a feigned crime, in order to become a fellow prisoner of the accused and there win his confidence, and a confession thus obtained was held admissible. The business of a scavenger is necessary, but not enviable nor admirable.

In Texas, in which State there is at once a vast amount of crime and a



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most determined and serious public disposition to punish and suppress it — Texas is the only State having a distinct Court for criminal cases and a separate series of reports of them, — the statute humanely provides that a confession from one under arrest to officials cannot be used unless he was previously cautioned that it might be used against him. So in *Nolen v. State*, 11 Texas Criminal Appeal, 474; 46 Am. Rep. 247, where the prisoner was under arrest for murder and in shackles, and was taken to the place of the homicide and asked what he had done with the body, and pointed to the hill where it had been found, this was held inadmissible because he had not been so cautioned. See note, 46 Am. Rep. 253.

The general rule is that mere exhortations and recommendations to confess, not amounting to promises or explicit false hopes held out, nor to threats, do not exclude the confession. *State v. Grant*, 22 Maine, 171; *Fouts v. State*, 8 Ohio State, 98; Wharton on Criminal Evidence, sect. 651. note; 6 Am. St. Rep. 248.

But very slight promises or threats have been held sufficient to exclude the evidence. As where the mistress of the accused said she "did not expect to do anything with her," *State v. Bostick*, 4 Harrington (Delaware), 563; "you shall not be hurt," *Earp v. State*, 55 Georgia, 136; "if he would bring up the meat there was a probability that the whole thing could be settled," *Byrd v. State*, 68 Georgia, 661; "he would not prosecute him heavy," *Rector v. Com.*, 80 Kentucky, 468; "you had better own up: I was in the place when you took it: we have got you down fine: this is not the first you have taken; we have got other things against you nearly as good as this," *Com v. Nott*, 135 Massachusetts, 269; "if you are guilty you had better own it," *State v. York*, 37 New Hampshire, 175; "the best he could do would be to own up; it would be better for him," *People v. Phillips*, 42 New York, 200; "you had better tell about it," *Vaughan v. Com.*, 17 Grattan (Virginia), 386. Inducing a belief that he will get off easier by confessing will render the confession inadmissible. *People v. Wolcott*, 51 Michigan, 612; *Smith v. State*, 10 Indiana, 106; *Van Buren v. State*, 21 Mississippi, 512; *State v. Whitfield*, 70 North Carolina, 356; *State v. Day*, 55 Vermont, 510. So where the prisoner asked Pinkerton, by whom he was arrested, and who urged him to confess and turn State's evidence, "what benefit am I to get out of this thing?" and Pinkerton replied that the only benefit he could get, so far as he could see, was "the benefit that any State's witness would get," although the district attorney warned him that his statement must be voluntary, and no promises would be made, the confession was held incompetent. *People v. Kurtz*, 42 Hun (New York Supreme Ct.), 335. So where an officer told the prisoner he would do what he could for him in the case. *Scarcey v. State*, 28 Texas Appeals, 513. So where a third person, pecuniarily interested in a conviction, says to the prisoner, in presence of the sheriff, "if you know anything, it may be best for you to tell it." *Green v. State*, 88 Georgia, 516; 30 Am. St. Rep. 167. In the very celebrated case of *Com. v. Knapp*, 9 Pickering (Mass.), 496; 20 Am. Dec. 491 (in which Daniel Webster made a famous argument), it was held that a confession induced by holding out hopes of a pardon was inadmissible.

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On the other hand, the confession was held competent, in *People v. Wentz*, 37 New York, 303, where “a police officer went into the room where the defendant was confined, and told him he was in a bad fix and he had got caught at last, and asked him who the others were.” This did not amount to a promise or holding out an inducement, but it was pretty clearly a threat, and is directly inconsistent with *Com. v. Nott, supra*. In *Fouts v. State*, 8 Ohio State, 98, a confession made after advice that if he was guilty the confession could not put him in any worse condition, and that he had better tell the truth at all times, was held admissible. And so in *State v. Freeman*, 12 Indiana, 100, where the prisoner was told that there was “no use in denying it, that the gold pieces had been found where he passed them, that he had better own up to it.” See *Ulrich v. People*, 39 Michigan, 245.

A confession obtained by duress is not admissible. *Young v. State*, 68 Alabama, 569; *State v. Chambers*, 39 Iowa, 179; *Flagg v. People*, 40 Michigan, 706. In *Young v. State, supra*, a mob took the prisoners out of jail and carried them to a place near the scene of the crime, and the confession was made there, but without threats. In *Hooper v. State*, 81 Alabama, 51, a young negro girl, mentally weak, was locked up in a smoke-house by her mistress, who told her she “reckoned” she would tell her about the crime, for she believed she knew about it. In *Flagg v. People, supra*, a weak-minded man was given whiskey to drink, and taken in irons to a lawyer’s office and confessed behind bolted doors. *State v. Chambers, supra*, and *State v. Revells*, 34 Louisiana Annual, 381; 44 Am. Rep. 436, were cases where confessions were made to mobs who had seized the prisoners. In such case the fear of mob violence supplies the place of explicit threats. In the *Revells case* the mob put a rope around the prisoner’s neck, taking him from bed in the night. The Court said: “He was not and could not be in a state of mind under which he could make a free and voluntary confession of guilt, uninfluenced by fear, or not alarmed by the dread of his numerous captors.” See *Nolen v. State*, 14 Texas Court Appeals, 474; 46 Am. Rep. 247. Even where a conviction was had upon the prisoner’s plea of guilty, made by advice of counsel to save him from the threatening violence of a mob, it was set aside. *Sanders v. State*, 94 Indiana, 147. Mere bonds however do not constitute duress. *State v. Whitfield*, 109 North Carolina, 876; *Franklin v. State*, 28 Alabama, 9.

Mere intoxication does not render the confession inadmissible. *State v. Grear*, 28 Minnesota, 126; 41 Am. Rep. 296; *Com. v. Howe*, 9 Gray (Mass.), 110; *Whitney v. State*, 8 Missouri, 165; but the jury may consider the prisoner’s state of mind.

In very recent cases confessions have been held admissible in the following circumstances: where the sheriff told the prisoner that he would listen to his story if he would tell the truth, but not otherwise. *Maul v. State*, 95 Alabama, 1; where the officer falsely pretended to a crowd, in the hearing of the prisoner, that he had come after him at the instance of his mother, and would befriend him if he was innocent. *Murphy v. State*, 89 Georgia, 425.

The following have recently been adjudged inadmissible: when made to the prisoner’s wife, at the jail, on her statement that she had been induced to

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advise him to confess by threats of a mob to hang them all if she did not do so. *Wigginton v. Com.*, 92 Kentucky, 282; where a third person remarked in presence of the sheriff and the prisoner that it might be best for him to confess. *Green v. State*, 88 Georgia, 516; where numerous persons, including some of the coroner's jury, begged him to confess and that it would be better for him to tell the truth, but that they did not know what the jury would do. *State v. Howard*, 35 South Carolina, 197; where the officer arresting him told him it might be easier for him if he would make an honest confession if guilty. *State v. Drake*, 113 North Carolina, 624. When the officer arresting him told him another had given the whole thing away, and that it would be better for him to tell all about it, and if he did he would do all he could to get him out of it. *Gallagher v. State*, Texas Criminal Appeals, [to appear].

The confession is not rendered inadmissible by the fact that the prisoner was not lawfully under arrest at the time. *Balbo v. People*, 80 New York, 484.

The fact that a confession was made by one who was shackled and in custody and when he had no counsel is not sufficient to make it inadmissible. *State v. Gorham*, 67 Vermont, 365.

The inducement, to render the confession inadmissible, must be some hope or promise of escape from punishment, and not merely some collateral advantage, as for example, of being unchained and released from solitary confinement. *State v. Tatro*, 50 Vermont, 483. Or to send his clothing to his mother and conceal the accusation from her. *Cox v. People*, 80 New York, 500.

When a confession is extorted by fear it is immaterial whether the threats proceed from one in authority or not in authority. *Jordan v. State*, 32 Mississippi, 382. Where it is induced by hopes held out, some Courts hold that the inducement must come from one in authority. *Young v. Com.*, 8 Bush (Kentucky), 366; *Rice v. State*, 22 Texas Court of Appeals, 654; *State v. Soper*, 16 Maine, 293; 33 Am. Dec. 665; *Cannada v. State*, 29 Texas Appeals, 537. Others hold that it is immaterial from whom the inducement comes. *People v. Smith*, 15 California, 409; *Jordan v. State*, *supra*.

There can be no conviction on a confession, without proof of the *corpus delicti*. *State v. German*, 54 Missouri, 526; 14 Am. Rep. 481; *Matthews v. State*, 55 Alabama, 187; 28 Am. Rep. 698; *Williams v. People*, 101 Illinois, 382; *Gray v. Com.*, 101 Pennsylvania State, 380; 47 Am. Rep. 733; *Stringfellow v. State*, 26 Mississippi, 157; *Priest v. State*, 10 Nebraska, 393.

Although a confession may be technically inadmissible, yet if in consequence of information thus received the authorities find circumstantial and corroborative evidence of the crime, it may be shown that the discovery was made conformably to the information thus given. So if a confession of larceny was improperly extorted, and the prisoner said the property would be found at a certain place, and it was so found, that fact and the fact of the information can be shown in evidence, but the confession that the prisoner put it there would not be receivable. *State v. Garrey*, 28 Louisiana Annual, 925; 26 Am. Rep. 123; *Gates v. People*, 14 Illinois, 433; *Jane v. Com.*, 2 Metcalfe (Kentucky), 30; *Murphy v. State*, 63 Alabama, 1; *Garrard v. State*,

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50 Mississippi, 147. Some Courts even hold the confession itself admissible in such circumstances. *Weller v. State*, 16 Texas Court Appeals, 200; *Daniels v. State*, 78 Georgia, 98; 6 Am. St. Rep. 238; and see *Sampson v. State*, 54 Alabama, 241; *Frederick v. State*, 3 West Virginia, 695. This doctrine seems an indirect way of using improper evidence.

The prisoner's testimony given by him before the coroner's jury, where he attends under compulsion, may be used against him on the trial, if given understandingly and voluntarily. *Hendrickson v. People*, 10 New York, 13; 61 Am. Dec. 721; *Teachout v. People*, 41 New York, 7; *People v. Chapleau*, 121 New York, 266; (*People v. McMahon*, 15 Id. 384, apparently to the contrary); but not otherwise. *People v. Mordon*, 103 New York, 211; 57 Am. Rep. 709; and so of a confession made at the preliminary hearing. *Coffee v. State*, 25 Florida, 501; 23 Am. St. Rep. 525.

In *State v. Harrison*, 115 North Carolina, 706, on an indictment for murder, an admission by the defendant, an infirm and diseased old woman, that she caused a person to do the killing, made to a detective disguised as a stave-getter, and induced by his promise that if she would tell him all about it he would give her something so that she would not be caught, was held admissible. The Court said: "When the competency of a confession is drawn in question, the correct inquiry in every such case is whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. *Rex v. Gibbons*, 1 Car. & P. 97; *Reg. v. Reason*, 12 Cox, Cr. Cas. 228; *Reg. v. Reeve*, Id. 179. The evil to be apprehended and guarded against is inducing an innocent person to confess guilt through hope or fear. When the acknowledgment of the truth of inculcating facts is not made under the impression that, whether it is true or false, the mere making of the statement will bring some benefit to or ward off some danger from the person making it in connection with an accusation of crime against such person, there is no sufficient reason for excluding evidence of the confession. There was no pretence of any power on the part of the witness to control the conduct of the authorities of the State as to instituting or pressing a prosecution for the crime. The witness was not known to the prisoner to be a detective. She stated, without inducement, that she knew who had killed her husband; but it did not follow necessarily that she was guilty as principal or accessory before or after the fact, though the witness seemed to think so. The hope held out to her appealed to superstition, and was calculated to make her believe that the witness, in return for her confidence, would give her some dose that would save her, not from prosecution, but from detection. The rule which is generally approved is that where the prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession in either case is admissible. *Rex v. Court*, 7 Car. & P. 486; *Meinaka v. State*, 55 Ala. 47; Russ. Crimes, pp. 395, 396. It is not material that the witness told her a falsehood in appealing to superstition, since the words used had no tendency to make the prisoner tell what was untrue. *Rex v. Thomas*, 7 Car. & P. 345; *Reg. v. Holmes*, 1 Car. & K. 248. If the prisoner had in no way participated in the commission of the crime, she had



## No. 5. — Reg. v. Thompson. — Notes.

no reason to fear a disclosure of the truth which she was invited to tell. The promise to protect, by witchery or cabalism, from being 'caught,' though it was an artifice resorted to to ascertain the truth, offered no temptation, in contemplation of law, to an innocent person to pretend that she was guilty. 3 Russ. Crimes (9th ed.) 395; 3 Am. & Eng. Enc. Law, p. 481, and note 1. On the contrary, the proposition of the witness was that she should tell him all about it " (presumably the truth), and not that she should confess her guilt; and it has been held as a rule that a request to tell the truth as to a transaction is not an inducement to an innocent person to pretend to be guilty. 3 Am. & Eng. Enc. Law, p. 474, and cases cited; *Meinaka v. State*, 55 Ala. 47."

"Any, the slightest menace of threat, or any hope engendered or encouraged that the prisoner's case will be lightened, meliorated, or more favorably dealt with if he will confess, — either of these is enough to exclude the confession thereby superinduced. Any words spoken in the hearing of the prisoner, which may in their nature generate such hope or fear, render it not only proper but necessary that confessions made within a reasonable time afterward shall be excluded, unless it is shown by clear and full proof that the confession was voluntarily made, after all trace of hope or fear had been fully withdrawn or explained away, and the mind of the prisoner made as free from bias and intimidation as if no attempt had ever been made to obtain such confessions." *Owen v. State*, 78 Alabama, 425, 56 Am. Rep. 40.

In *State v. Fields*, Peck (Tennessee), 140, it was said: "The evidence of such confessions is liable to countless abuses. They are made by persons generally, under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To disclose the confession is odious as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tormented with anguish, and difficulties gathering into a multitude, — how easy it is for the hearer to take one word for another, or to take a word in a sense not intended by the speaker, and for want of an exact representation of a tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible it is to make a third person understand the exact state of his mind and meaning! For these reasons this evidence is received with great distrust and under apprehensions of the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats or severity or promise of favor, and of every influence, even the minutest."

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No. 6. — *Rex v. Judd*, 2 T. R. 255. — Rule.

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SECTION IV. — *Procedure.*No. 6. — *REX v. JUDD.*

(K. B. 1788.)

## RULE.

ALTHOUGH it is not necessary to state in a warrant of commitment on a charge of felony, that the act was done "feloniously," yet unless the facts charged amount to a felony, the defendant must be admitted to bail.

*Rex v. Judd.*

2 T. R. 255–257 (s. c. 1 R. R. 477).

*Criminal Law. — Bail. — Warrant of Commitment.*

Although it is not necessary to state in a warrant of commitment on a [255] charge of felony, that the act was done "feloniously;" yet unless it sufficiently appear to the Court, on the facts stated in this charge, that a felony has been committed, they are bound to bail the defendant. Setting fire to a parcel of unthreshed wheat is not a felony within 9 Geo. I. c. 22.

The defendant was brought up on this day by a writ of *habeas corpus*, from Hertford, in order to be bailed. His commitment, being read, was as follows:—

Hertford, to wit, to all constables, &c. Receive into your custody the body of Henry Judd, of Stansted &c., herewith sent you, being charged before us, &c., by the oath of George Sworder, Thomas Saville the younger, and Matthew Skipp, with giving two guineas to Daniel Wright late of Albury, in the said county of Hertford, on 12th May last, at Stansted, &c. [which D. Wright stands convicted of a burglary in the dwelling-house of the said George Sworder, at, &c., at the last assizes for the said county] to disturb the dwelling-house of the said George Sworder, at, &c. And also with giving to Nathaniel Rand, of Stocking Pelham in the said county, charcoal-burner, about a fortnight after harvest last, a guinea and a half to keep on with the said George Sworder as the said N. Rand had then begun, and to do him the said George Sworder all the mischief he could, except killing him. And for being accessory with the said N. Rand, who was, on

29th December last, committed to Hertford gaol, on the oaths of the said George Sworder and others, as well as upon his own confession, in wilfully and maliciously setting fire to a parcel of unthreshed wheat, in Stocking Pelham aforesaid, in the night of Wednesday 26th December last, which was the property of the said G. Sworder, and which he the said N. Rand hath confessed he did at the request of the said Henry Judd. These are therefore, &c. Signed by eleven justices.

[\* 256] \* It was objected, that this commitment contained no charge of felony, and therefore that the defendant was entitled either to be discharged or bailed under the *habeas corpus* Act, 31 Car. II. c. 2. With respect to the two first charges in the indictment, it was admitted, that neither of them was sufficient to detain the prisoner in custody. The latter was contended by the prosecutor to be a charge of felony within the 9 Geo. I. c. 22, which makes it felony to set fire to any house, &c., or to any cock, mow, or stack of corn. The objection to the sufficiency of this part was, that it was not charged to be done feloniously; and the defendant was only charged with being accessory to the wilfully and maliciously setting fire to a parcel of unthreshed corn, which was no offence within the statute.

Erskine, Mingay, and Garrow, for the prosecution. Sylvester and Fielding for the defendant.

ASHHURST, J. However improper the defendant's conduct appears to have been upon the proceedings before the justices, yet unless it appears upon the face of the commitment itself, that the defendant is charged with a felony, we are bound by the *habeas corpus* Act to discharge him: taking such bail for his appearance to take his trial as we in our discretion shall think fit, according to the circumstances of the case. And therefore the question is, Whether there is specified in this commitment such an offence as amounts to felony? It is admitted that neither of the two first charges in the commitment amounts to felony. With respect to the last charge, it is not that the defendant was an accessory with Rand in feloniously, but only with wilfully and maliciously, setting fire to a parcel of unthreshed wheat. And though it is not necessary that the word "feloniously" should be used in the commitment: yet it ought to appear on the facts stated to be in law a felony, and within the description of the Act: now the statute has only made it felony to set fire to a cock, mow, or

No. 6. — *Rex v. Judd*, 2 T. R. 256, 257. — Notes.

stack, of corn; and the defendant is not charged with either of these. Whatever words the Legislature used, we must suppose that they knew the meaning of them; and if a justice uses the same words, we are bound to suppose that he intended them in the same sense; but if he makes use of other words, he must be more precise. Now here a parcel of corn is too indefinite a description. It does not come within the description of the Act, and we cannot say how much it is. Twenty ears of wheat is a parcel. Therefore I am of opinion that, \* as the war- [\* 257] rant of commitment does not charge the defendant with a felony, we are bound to bail him. With regard to the *quantum* of the bail; although the nature of the defendant's crime is not very accurately stated, yet as sufficient appears on the depositions, returned with the commitment, to show that he has at least been guilty of an enormous offence, I think we ought to take ample security for his appearance; and that he himself should be bound in £1000, and four sureties in £500 each.<sup>1</sup>

GROSE, J. It is not necessary that the act should be charged in the warrant of commitment to be done *felonice*; it would be sufficient if on the facts stated we could not but see that the act was feloniously committed. If therefore a parcel of wheat, *ex vi termini*, described a cock, mow, or stack of wheat, I should be of opinion that a felony was sufficiently charged in this commitment: but I think that it does not; for if in the act of removing a stack of corn from a farmer's yard to his barn, a small parcel dropped by accident, the setting fire to that parcel would not be an offence within the Act of Parliament. As to the sureties which we in our discretion should require, I am of opinion that the security mentioned by my brother ASHHURST ought to be given, since we cannot but see that the defendant has been guilty of a most atrocious act.

*Defendant bailed himself in £1000 and four sureties in £500 each.*

## ENGLISH NOTES.

The ruling case was applied in *Rex v. Remnant* (1793), 5 T. R. 169; *Reg v. Lowden* (1839), 7 Dowl. P. C. 538, 1 Wilm. Woll. & H. 551; and *Reg. v. Bartlett* (1843), 12 L. J. M. C. 127, Dowl. & L. 95, 7 Jur. 649. In the last mentioned case the prisoner was committed to prison on a charge of perjury; and this was held to be without

<sup>1</sup> BULLER, J., was absent.



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**No. 7. — Reg. v. Gray. — Rule.**


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jurisdiction, as the warrant did not state that the oath was administered in a judicial proceeding.

Where however it appears that a felony has been committed the Court will remand the prisoner to gaol, although the act is not alleged to have been done feloniously. *Rex v. Marks* (1802), 3 East, 157, 6 R. R. 577; *Rex v. Croker* (1815), 2 Chit. 138; *Ex parte Terraz* (1878), 4 Ex. D. 63, 48 L. J. Ex. 214, 39 L. T. 502.

A commitment for "treasonable practices" by warrant of a Secretary of State, under an act which suspended the *Habeas Corpus* Act, was held legal. *Rex v. Despard* (1798), 7 T. R. 736, 4 R. R. 563. The case was argued on the part of the Crown and decided on the footing that the warrant was valid at common law.

The power to grant a writ of *habeas corpus* exists independently of any statute. *In re Besset* (1844), 6 Q. B. 481, 14 L. J. M. C. 17, 9 Jur. 66.

#### AMERICAN NOTES.

It is the right of the accused, in this country, to be admitted to bail even in felonies less than capital, subject to the right of the magistrate to refuse bail in his discretion, as for example, where he deems that there is danger of escape. This right to bail is generally guaranteed by the constitutions, which also provide that excessive bail shall not be exacted. By some constitutions, even in capital cases, the accused is entitled to bail, unless "the proof is evident." *Ex parte Foster*, 5 Texas Appeals, 625; 32 Am. Rep. 577; *Ex parte McNally*, 53 Alabama, 495; 25 Am. Rep. 646. See *People v. Tinder*, 19 California, 539; 81 Am. Dec. 77; *Ex parte Goans*, 99 Missouri, 193; 17 Am. St. Rep. 571; *Ex parte Harris*, 26 Florida, 77; 23 Am. St. Rep. 548. See 1 Bishop on Criminal Procedure, sect. 261.

#### No. 7. — REG. v. GRAY.

(C. C. R. 1864.)

#### RULE.

EVERY ingredient of an offence must be stated with the strictest particularity in an indictment. Therefore upon an indictment for an offence which is a felony, the act must be averred to have been done "feloniously."

## No. 7. — Reg. v. Gray, 32 L. J. M. C. 78.

Reg. v. Gray.<sup>1</sup>

33 L. J. M. C. 78-79 (s. c. 10 Jur. N. S. 160; 9 L. T. 733; 12 W. R. 350;  
9 Cox C. C. 417).

*Criminal Law. — Indictment. — Form. — Necessary Averment.*

No indictment for a felony, either created by a statute or at common [78] law, is good, unless it allege that the accused did the act charged as the offence “feloniously.”

This case was stated by the chairman of the Quarter Sessions for the county of Essex.

At the Michaelmas Quarter Sessions for the county of Essex, held at Chelmsford, on Tuesday, the 20th of October, 1863, Ephraim Gray was put upon his trial upon the following indictment:—

Essex, to wit. — The jurors for our Lady the Queen, upon their oath, present that Ephraim Gray, late of the parish of Romford, in the county of Essex, labourer, on the 29th day of October, in the year of our Lord, 1862, with force and arms at the parish aforesaid, in the county aforesaid, did unlawfully and maliciously damage, with intent to destroy, certain machines, then and there being, and used for ploughing, and performing other agricultural operations, to wit, two ploughs and one scarifier, the property of John Samuel Finch, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity. The prisoner pleaded not guilty. His counsel objected to the validity of the indictment, that the word “feloniously” was omitted in it, and also contended that as the ploughs which he was charged with unlawfully and maliciously damaging, were, one of them a patent plough, of Bastall, and the other an ordinary plough, both of them of a description commonly in use in agriculture, and worked by horses, and the scarifier also of a description commonly in use, the damaging was not an offence within the statute, 24 & 25 Vict. c. 97, s. 15. The chairman left the facts to the jury, who found the prisoner guilty, and the Court directed that the prisoner should enter into a recognizance of bail, with a surety in the sum of £50, conditioned to appear and receive judgment when called upon, and reserved the two questions

<sup>1</sup> *Coram* COCKBURN, C. J., CROMPTON, J., WILLES, J., CHANNELL, B., and KEATING, J.

of law for the consideration of the Justices of either Bench and Barons of the Exchequer.

Murphy, for the prisoner. — The indictment is for a felony, and is bad for not using the word "feloniously." That word is a term of art, and it has always been held necessary in an indictment for felony to use the word "feloniously," and that it is not sufficient merely to use the words of the statute which creates the offence. This indictment cannot be read as an indictment for a misdemeanour; for damaging machines, with intent to destroy, is a felony by the statute, 24 & 25 Vict. c. 97, s. 15.

Philbrick, for the prosecution. — In an indictment for an offence at common law it is necessary to allege that the act was done feloniously, but that rule does not apply so strictly in the case of an offence under a statute. If a statute says that a certain act shall be a felony, and the indictment states that the accused has committed that act, and brings the accused within the words of the statute, the allegation of the offence is complete, and the indictment good, although the word "feloniously" is not used. In the note to Com. Dig. tit. 'Indictment,' G. 6, edition of 1822, by Hammond, this is stated to be law, and *The King v. Johnson*, 3 M. & S., 539, 16 R. R. 352, is cited as the authority for that proposition. It is true that the indictment in that case, after alleging the facts, concluded, "and so the prisoner feloniously did steal." *The King v. Crighton*, Russ. & R. 62, is to the same effect.

[WILLES, J. In *Holford v. Bailey*, 13 Q. B. 426; 18 L. J. Q. B. 109, PARKE, B., says, that the words "felony," "murder," and "burglary," are terms of art, and that it is not sufficient to use equivalent expressions.]

The prisoner being tried as for a felony has not been deprived of any of the advantages of challenging the jury.

[CROMPTON, J. It would be very inconvenient if the clerk of arraigns had in each case to look through the statute book to ascertain whether the offence charged in an indictment were a felony or a misdemeanor.]

[\* 79] \* The general rule is stated in 2 Hawkins, P. C. c. 25, ss. 55, 110.

COCKBURN, C. J. All the text books lay down the law that no periphrasis will supply the omission in an indictment of the words of art which the law has appropriated for the description of the

## No. 7. — Reg. v. Gray, 32 L. J. M. C. 79. — Notes.

offence, such as the word “feloniously” in an indictment for felony; and they lay it down without making any distinction between felonies which are created by statute and other felonies. The rule is, I think, founded on right principle. It would be introducing great confusion if it were left doubtful whether an indictment for an offence was for a felony or for a misdemeanor. It is far safer, in my opinion, to adhere to the old rule and the long-established practice.

The other Judges concurred.

*Conviction quashed.*

## ENGLISH NOTES.

In Bro. Ab. tit. Corone, 175, pl. 2, it is said: “Nota, that petit larceny, scilicet felony under 12 pence, is felony, and the indictment shall be *quod felonice cepit*, &c.,” citing 27 Hen. VIII. 22. This authority seems in no way affected by the abolition of the distinction between grand and petit larceny. In *Reg. v. Thomas* (C. C. R. 1875), L. R., 2 C. C. R. 141, 44 L. J. M. C. 42, 31 L. T. 849, 23 W. R. 344, the prisoner was indicted under 24 & 25 Vict. c. 99, s. 12, for the felony of uttering counterfeit coin after a previous conviction for a like offence. The jury found him guilty of uttering, but negatived the previous conviction. This was held to amount to an acquittal, as the prisoner, having been indicted for a felony, could not be convicted of a misdemeanour.

In the case of *Holford v. Bailey* (Ex. Ch. 1849), 13 Q. B. 426, 18 L. J. Q. B. 109, 13 Jur. 278, a declaration of trespass *vi et armis* upon a several fishery, PARKE, B., in delivering the judgment of the Court said: “If the words ‘several fishery’ were terms of art such as the words ‘felony,’ ‘murder,’ ‘burglary,’ equivalent expressions could not be used.”

To the high authority of Lord WENSLEYDALE, may be added the resolution of the judges reported in Popham, 42. “The ancient presidents are ‘*Quod domum (of such a one) Noctanter Felonice et burglariter fregit.*’” In the same book however (p. 52), the form is varied to “that the house of such a one *Noctanter fregit*, and the goods then and there *Felonice cepit.*” In the later resolutions the judges were considering whether it was necessary to aver that any persons were in the house, and were not particularly considering the terms of art to be employed. On both occasions the judges resolved that it was not necessary to aver that any persons were dwelling in the house.

“In some cases, words are the subject-matter of the indictment; . . . wherever the offence consists of words written or spoken, those words must be stated in the indictment; if they are not, it will be



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defective upon demurrer, in arrest of judgment or upon writ of error.” *Per* BRAMWELL, L. J., *Bradlaugh v. Reg.* (C. A. 1878), 3 Q. B. D. 607, 38 L. T. 118, 26 W. R. 410. So the actual words used must be set out where the offence charged is a libel. This rule was applied in the case of an obscene libel. *Bradlaugh v. Reg.*, *supra*; and the cases on the subject generally are there collected. So a conviction under 6 & 7 Will. III. c. 11, that the defendant “did profanely swear 54 oaths, and did profanely curse 160 curses,” was held bad. *Rex v. Sparling* (1722), 1 Str. 497.

Until the amendment of the law by statute (24 & 25 Vict. c. 98, s. 42; c. 100, s. 20) it was necessary to set out the words of a document alleged to be a forgery: *Rex v. Hunter* (1794), 2 Leach, C. C. 624; and the words used, if the charge were one of perjury: 2 Chit. Cr. Law, ch. 9, p. 307, 2nd ed. So an indictment that the defendant neglected to execute “diversa Præcepta et Warranta” was quashed, on the ground that it did not set forth the nature and tenor of the warrants. *Barrough’s Case* (1678), 1 Vent. 305.

In the case of an obscene print or pictures it is not necessary to reproduce them in the indictment, but it is sufficient if they are described. *Dugdale v. Reg.* (1853), 1 El. & Bl. 435, Dears. 64, 22 L. J. M. C. 50, 47 Jur. 546. See the observations on this case in *Bradlaugh v. Reg.*, *supra*.

In the case of false pretences, the indictment must set out the pretences: *Reg. v. Mason* (1788), 2 T. R. 581, 1 R. R. 545; *Rex v. Perrott*, No. 8, p. 117, *post*: *Reg. v. Goldsmith* (1873), L. R. 2 C. C. R. 74, 77, 42 L. J. M. C. 94, 96. The indictment must also state the person to whom the false pretence was made, and from whom the property or money was obtained: *Reg. v. Sowerby* (C. C. R. 1894), 1894, 2 Q. B. 173, 63 L. J. M. C. 136, 71 L. T. 300, 42 W. R. 608. Where the false pretence was contained in an advertisement in a newspaper, and the indictment alleged that the prisoner “did falsely pretend to the subjects of Her Majesty the Queen, . . . by means of which last mentioned false pretence the said G. S. did then unlawfully obtain from the said R. C., &c.” — it was held that the words which cut down the generality of the averment were sufficiently connected therewith to identify the person to whom the pretence was made. *Reg. v. Silverlock* (C. C. R. 1894), 1894, 2 Q. B. 766, 63 L. J. M. C. 233, 43 W. R. 14.

In cases of conspiracy, the confederation is the gist of the offence. So, on an indictment for conspiracy to defraud by false pretence, the indictment will be good if the gist or tenor of the pretences and not the specific pretences are set out. *Reg. v. Aspinall* (C. A. 1876), 2 Q. B. D. 48, 40 L. J. M. C. 145; *Rex v. Gill* (1818), 2 B. & Ald. 204, 20 R. R. 407. Where there is a conspiracy to defraud the public generally,

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the names of persons intended to be defrauded need not be set out. *Rex v. De Berenger* (1814), 3 M & S. 67, 15 R. R. 415. But where the words alleging a conspiracy show that the object was to injure individuals, and not an indefinite body of persons, the indictment must set out the names of the persons intended to be defrauded, or give some excuse for not naming them. *King v. Reg.* (Ex. Ch. 1845), 7 Q. B. 795, 14 L. J. M. C. 172, 9 Jur. 883.

Upon a similar principle, an indictment charging a person receiving goods, knowing them to have been obtained by false pretences, need not set out the pretences. *Reg. v. Goldsmith* (C. C. R. 1873), L. R., 2 C. C. R. 74, 42 L. J. M. C. 94, 28 L. T. 881, 21 W. R. 791; *Taylor v. Reg.* (1895), 1895, 1 Q. B. 25, 64 L. J. M. C. 11.

In cases of murder the means by which the death was compassed must have been set out formerly, but (by 24 & 25 Vict. c. 100, s. 6) this is no longer requisite. As cases on the old law may be cited *Rex v. Kelly* (1825), 1 Mood. C. C. 113; *Rex v. Thompson* (1826), 1 Mood. C. C. 139, *Rex v. Hughes* (1832), 5 Car. & P. 126; and *Rex v. Jones* (1843), 1 Car. & K. 243.

To support an indictment for perjury, the oath must have been taken in a judicial proceeding, and be material to the question depending: *Rex v. Aylett* (1785), 1 T. R. 63, 1 R. R. 152. Lord KENYON, CH. J., accordingly directed an acquittal where the perjury assigned was on an answer in Chancery, denying a promise void by the Statute of Frauds. *Rex v. Benesch* (1796), 2 Peake 39, 4 R. R. 894. Questions going to the credit of a witness are material to the issue, and false answers to this class of question may be the foundation of an indictment for perjury. *Reg. v. Baker* (C. C. R. 1895), 1895, 1 Q. B. 797, 64 L. J. M. C. 177, 72 L. T. 631, 43 W. R. 654.

An arbitration has been held to be a judicial proceeding, subjecting a person who prepares false evidence to be used thereat to liability to be indicted for attempting to pervert the course of justice. *Reg. v. Treones* (C. C. R. 1891), 1891, 1 Q. B. 361, 60 L. J. M. C. 62, 64 L. T. 389, 39 W. R. 365, 17 Cox, C. C. 269.

In *Rex v. Dixon* (1814), 3 M. & S. 11, 4 Camp. 12, 15 R. R. 381, an indictment charging the defendant, who was employed to make bread for an asylum, with delivering to a named person 297 loaves, as and for good household bread, for consumption in the asylum, whereas the said loaves were not good household bread, but contained divers noxious and unwholesome materials, not fit for the food of man, — but without specifying the materials, — was held good. This decision proceeded on the ground that the particular species of noxious materials were presumably known to the defendant.

No. 8. — *Rex v. Perrott.* — Rule.

## AMERICAN NOTES.

“There is no proposition more clear in law than that in all indictments for felony the indictment must charge the act to have been done feloniously, or with a felonious intent.” *Jane v. State*, 3 Missouri, 61. “In all cases of felonies at common law, and some also by statute, the felonious intent is deemed an essential ingredient in constituting the offence, and hence the indictment will be defective even after verdict unless the intent is averred.” *State v. Eldridge*, 7 English (Arkansas), 608. To the same effect, *State v. Gilbert*, 24 Missouri, 380; *Williams v. State*, 8 Humphrey (Tennessee), 585; *Mears v. Com.*, 2 Grant (Pennsylvania), 385; *Cain v. State*, 18 Texas, 387; *Bowler v. State*, 41 Mississippi, 570. This doctrine is admitted in *State v. Murphy*, 17 Rhode Island, 698; 16 Lawyers’ Rep. Annotated, 550 (citing the principal case), but held inapplicable to forgery, because it is not a felony at common law.

In *Edwards v. State*, 25 Arkansas, 444, it was held that the omission of “feloniously” in an indictment for murder was fatal, and that “purposely and of deliberate and premeditated malice” would not supply the defect. “The authorities,” said the Court, “with scarcely an exception, agree that it is absolutely necessary, in charging a felony, to allege that the act was *feloniously* done.” Citing among other cases, *Respublica v. Honeyman*, 2 Dallas (U. S. Supreme Ct.), 228, which is in point.

Some courts however hold in respect to a statutory felony that it is sufficient to follow the words of the statute, and unless the statute contains the word “feloniously,” the indictment need not contain it. *Miller v. People*, 2 Scammon (Illinois), 233; *Jane v. Com.*, 3 Metcalfe (Kentucky), 18; *State v. Switzer*, 63 Vermont, 604; 25 Am. St. Rep. 789 (case of false pretences); *People v. Olivera*, 7 California, 403. In the last case a dissenting Judge observed: “A crime may be the result of wickedness or malice, and at the same time may not have been committed with a *felonious* intent.”

Wharton says (1 Criminal Law, sect. 399): “The word ‘feloniously’ is essential to all indictments for felony, whether at common law or statutory,” citing the principal case. (He however notices the doctrine mentioned in the last paragraph.)

No. 8. — *REX v. PERROTT.*

(K. B. 1814.)

No. 9. — *HEYMANN v. REG.*

(Q. B. 1873.)

## RULE.

EVERY indictment must be so framed as to convey to the party charged a certain knowledge of the crime imputed

No. 8. — *Rex v. Perrott*, 2 M. & S. 379, 380.

to him. So an indictment for obtaining money under false pretences must negative, by special averment, the truth of the pretences. The want of such averment is a fatal defect, and a ground on which, even after verdict of guilty, judgment may be reversed on writ of error.

But an averment imperfectly expressed, which might have been bad on demurrer, may be cured by the verdict, if the Court thinks that the unexpressed matter was necessarily involved in the finding of the jury.

**Rex v. Perrott.**

2 Maule & Selwyn, 379-392 (s. c. 15 R. R. 281).

*Criminal Law. — Indictment. — Error.*

An indictment on 30 Geo. II. c. 24, for obtaining money by false pre- [379] tences, must negative by special averment the truth of the pretences: it is not enough to charge that the defendant falsely pretended, &c. (setting forth the pretences), by means of which said false pretences he obtained the money, &c.; therefore, for want of such averment in the indictment, the Court reversed the judgment.

Error to reverse a judgment of imprisonment given at the Lent assizes, 1812, for the County of Kent, upon a verdict of guilty there found on an indictment for obtaining bank-notes and money by false pretences; to which indictment the defendant pleaded not guilty.

The first count of the indictment charged, that before and at the several times of committing the several offences, &c., one Bullen was a person liable to be impressed as a seaman in his Majesty's navy; that a little before the time of committing the offence by the defendant, hereinafter next mentioned, a certain discourse had been had between the said Bullen and Elizabeth his wife, and the defendant, touching and concerning the obtaining a protection from the commissioners for executing the office of lord high admiral of the United Kingdom of Great Britain and Ireland, to secure and exempt Bullen from being impressed as a seaman in his Majesty's navy, and the defendant had then and there proposed and offered that he the defendant would apply for such protection for Bullen; that the defendant, \* being an evil- [\* 380] disposed person, and contriving and fraudulently intending



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to cheat and defraud Bullen of his monies, &c., afterwards, to wit, on the 15th day of December, in the 52d year of the reign of George III., with force and arms, &c., unlawfully, wickedly, knowingly, and designedly, did falsely pretend to the said Bullen that he the defendant could obtain such protection for Bullen, by favour from the lords of the admiralty, by feeing the clerks, as he had an uncle a lord of the admiralty, and that it would be no great expense, as he could get it done through favour; that the defendant contriving and fraudulently intending as aforesaid, afterwards, to wit, on the 16th of December, in the 52d year of the reign aforesaid, with force and arms, &c., unlawfully, wickedly, knowingly, and designedly did again falsely pretend to Elizabeth, the wife of Bullen, that he could get the protection for £6, that as Mr. Read could get it done, that the £6 were to give to Mr. Read for getting the protection: by means of which said several false pretences, the defendant afterwards, to wit, on the same day and year last aforesaid, at the parish and county aforesaid, unlawfully, knowingly, and designedly, did obtain from the said Elizabeth, the wife of the said Bullen, divers, to wit, five promissory notes of the governor and company the Bank of England, for the payment of £1 each, &c., and also the sum of £1 in money, of the promissory notes and monies of the said Bullen, with intent then and there to cheat and defraud the said Bullen of the same, in contempt of our said lord the king, &c., against the form of the statute, and against the peace, &c. The indictment contained ten other counts in a similar form.

[\* 381] \* And the error assigned was, that there is not in any or either of the several counts of the said record of indictment any averment or averments, to falsify the matter or matters of the several pretences in the several counts of the said record of indictment, severally and respectively contained, &c., by which it can appear to the Court here, upon the face of the said record of indictment, that any or either of the pretences, so as aforesaid severally and respectively alleged in the several counts of the said record of indictment, against the defendant, to have been severally and respectively falsely pretended by the defendant, or any or either of them, are or were false and untrue: concluding with an assignment of the general error.

Knowlys, in support of the errors assigned, took exception to the indictment, because it is not shown by any averment, negativing

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the truth of the alleged false pretences, that the pretences were false; and without such averment the Court cannot intend that they were false, by reason that it is alleged that the defendant did falsely pretend, &c. And he referred to 2 Hawk. c. 25, s. 60, to *Long's Case*, 2 Hale's P. C. 182, s. c. Cro. Eliz. 490, *Rex v. McGregor*, 3 Bos. & P. 107, and 2 Hale, P. C. 193, to show generally, that an indictment ought to be certain to every intent, without any intendment; and that the want of any material allegation cannot be supplied by implication; neither is a defective indictment aided by verdict. And he said that the omission of the averment negating the truth of the pretences could not be supplied by the words that "he did falsely pretend;" because the law did not attach \*any peculiar or technical [\*382] force to the word "falsely," so as to make the use of it in itself equivalent to a positive averment of the falsehood of the thing in respect of which it is predicated. And therefore in *Rex v. Airey*, 2 East, 30, it was holden not to be necessary to allege that he falsely pretended; which could not have been, if the word "falsely" were technically descriptive of the falsehood of the pretence. There is not any instance of an indictment, such as this, having been upheld; and if it may be in this instance, why may not an indictment for perjury be good without averring that the matters are false? The two crimes are in their nature nearly allied, falsity being the essence of both; and according to this, it would be sufficient in perjury merely to allege that the defendant falsely swore, setting out the matters, and so conclude that he did commit perjury. And yet not only is there not any precedent of such an indictment, but the statute, 23 G. II., c. 11, for rendering prosecutions for perjury more easy and effectual, expressly recognizes the necessity of such indictments containing "the proper averments to falsify the matters wherein the perjury is assigned."

Jervis, *contra*, maintained, that there was not any difference in substance between an allegation that he did falsely pretend, and an allegation that he did pretend, whereas in truth and in fact such pretence was false. Either mode was sufficient to show to the Court the falsity of the matter, and apprise the defendant of the offence charged against him; which is all that is required.

As to the falsity, its being laid falsely is as \*direct [\*383] a mode of negating the truth, as if it had been specially negated; and according to *Rex v. Airey*, it is not necessary to

do both. In *Carpenter v. Tarrant*, Cas. temp. Hardw. 340, Lord HARDWICKE, speaking of the necessity of averring the falsity in an action of slander, said that he took it, that the words being laid to be spoken *falsè et malitiose*, was an averment that the words were false; for if they were spoken falsely the words could not be true; and if they were true, it lay upon the defendant to show that in mitigation of damages. So here, if he falsely pretended, the pretences could not be true; and if they were true, according to Lord KENYON, in *Rex v. Young*, 3 T. R. 102, 1 R. R. 660, it was competent to the defendant to have proved it in his defence. Then as to the notice which this indictment afforded to the defendant of the charge imputed to him, the pretences are all set forth in particular, and so it is not like *Rex v. Mason*, 2 T. R. 581, 1 R. R. 545, and the whole of them is negatived by the allegation that he falsely pretended; and the defendant had this advantage from the indictment's not separately negating the several pretences, but only in the general, that unless the whole had been proved to be false, he would have been entitled to an acquittal; whereas if they had been separately negatived, he might have been convicted upon proof of the falsity under any one averment, though under all the others he might have been able to prove that they were true. And supposing the prosecutor had negatived separately the truth of the pretences one by one, which he might have done, though one only out of the whole was false, and still the indictment [\*384] would have been good; that \* would only have been doing the same thing in a more circuitous way which the prosecutor has now done in a more compendious one, and still the indictment would have afforded no more notice of the charge to the defendant than it has now done. Also as to stat. 30, G. II., c. 24, upon which this indictment is framed, the rule is, that the indictment must bring the fact within the express prohibition of the statute, otherwise it will be insufficient. The words of the statute are, that "all persons who knowingly and designedly by false pretences, &c., shall obtain money, &c., with intent to cheat any person, &c., shall be deemed offenders, &c." And this indictment brings the fact within the express prohibition and very letter of the statute, for it alleges that he did falsely pretend, and by means of such false pretences did obtain money, &c., with intent to cheat, &c. And no analogy can be drawn in this respect from the practice upon indictments for perjury; because that offence is

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not the same in its nature, and there is also a difference in the mode both of charging and proving it. Perjury is a false affirmation upon oath, this a false affirmation only; in perjury, every assignment is in the nature of a fresh count, and is distinct from the rest, and does not require the whole to sustain it; in this offence, the whole which constitutes the entire pretence must be alleged; there the crime must be proved by two witnesses, here it need not. Therefore the statute which relates to perjury, and the proper averments required in that case cannot be supposed to apply to this; and if it could, it has not said that such an averment as this is not a proper averment.

\* Knowlys, in reply, denied that in all cases it was [\* 385] sufficient, in order to bring the fact within the prohibition of a penal statute, if the indictment pursued the very letter of the statute; and said that *Rex v. Mason* proved that it was otherwise in this very case. And he was proceeding, but was stopped by the Court.

LORD ELLENBOROUGH, C. J. I think we need not trouble you farther. Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The Legislature have so held, and have recorded their opinion to that effect in the case of perjury, in stat. 23 Geo. II. c. 11 (by which they relieved the party prosecuting from many of the forms theretofore incumbering the prosecution of that charge), when they enacted that it should be sufficient to set forth the substance of the offence charged, together with the proper averments to falsify the matter wherein the perjury is assigned. The Legislature, when they so enacted, must have contemplated a form of prosecution in which the word “falsely,” as a prefatory allegation, was generally, if not always, used; and we must consider them as thinking that not a sufficient allegation to falsify the matter without the proper averments. The Legislature, therefore, with reference to that species of prosecution, have declared their opinion to be, that such averments should be found in every information or indictment for perjury. I have listened with great attention to the arguments of the learned counsel for the Crown; but I confess I cannot see any distinction in this respect between an indictment for perjury and one for false \* pre- [\* 386] tences. What more is there in perjury than a false pretence or affirmation on oath? and in what does a false pretence



differ from perjury but that it is not on oath generally, but only a false affirmation, amounting to a pretence, unaccompanied with an oath? The falsifying of the one and the other, as it should seem, ought to be governed by the same rules. When a party, therefore, is called on to answer for obtaining money by a false pretence, it is but reasonable that he should have the same notice as in perjury, by proper averments of that which is intended to be relied on against him. To state merely the whole of the false pretence is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied with some truth. Suppose the offence, instead of being comprised within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as the vehicle of the falsity, are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and in furtherance of that convenience it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached [\*387] \* for falsehood. The Legislature have expounded their understanding of the matter in the case of perjury, and I am at a loss to discover why in reason, in justice, and in mercy to the party, the charge in this case should not be as distinctly ascertained by proper averments that specifically draw his attention to it, as in the case of perjury. It has been argued, that perhaps every one of these charges may be false: but the rule, as it has been derived from cases of a mixed nature, where part is true and part false, has introduced a course of separating, by specified averments, all that which is meant to be relied on as false. The analogy to the crime of perjury is so strict, and justice also suggests the same, that I think it should be specifically announced to the party by distinct averments what the precise charge is. It has always been done upon indictments for obtaining money by false pretences, and whenever a more general form of indictment has

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come under consideration it has not met with countenance, but the Court, as in *Rex v. Mason*, have reprobated it. If it were good, every man might be brought into court without any possibility of knowing how to defend himself. Therefore, for convenience' sake, and for the manifestation of the crime imposed, I think that which the Legislature have authoritatively announced to be necessary in the case of perjury, must also be done in this case; and therefore that this judgment must be reversed.

LE BLANC, J. On this writ of error the question arises upon the indictment; and the question is, whether, on the face of this indictment, it is a sufficient compliance with the terms of the Act of Parliament, \* and the known rules of law, [\* 388] for the indictment to allege "that the defendant did falsely pretend, &c., by means of which said several false pretences the defendant did obtain divers promissory notes, &c.," without alleging that each particular thing which goes to make up the false pretence, or such of the things as are meant to be insisted on, are false. That is the single question on this indictment. In the first place, it is necessary to look to the words of the stat. 30, Geo. II. c. 24: they are "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person money, &c., with intent to cheat or defraud any person of the same, &c., shall be deemed offenders, &c." The argument has been, that if the indictment pursues the words of the Act of Parliament, that is enough to show it an offence within the Act. But that rule will not hold universally; because it is not always enough that the indictment follows the words of the Act. If it were sufficient to follow the words of the Act, it might be argued, as in the case of *Rex v. Mason*, that to allege merely that the party did obtain money by false pretences, without stating of what those pretences consisted, would be sufficient. But in that case the Court held, that such a form of allegation was insufficient; and that the indictment must not only state that the money was obtained by false pretences, but must go on further to show, what those pretences are. The question then here is, whether it be a sufficient compliance with the Act of Parliament and the known rules of law to state that the defendant did falsely pretend (setting out the false pretences), without going on further to aver that those pretences were false. The argument is that alleging that the defendant did

\* falsely pretend, &c., generally, and in a lump, is equiv- [\* 389]

alent to an averment that each of those pretences was false. But a number of pretences may consist of some facts which are true and some false; and it is a necessary rule in framing indictments that not only the offence should be truly described, but that it should be described in such a manner as to give the party indicted notice of the charge. Therefore when a party is charged with obtaining money under false pretences, the indictment ought to state in what particular such pretences are false. Here it is charged in the first count, "that the defendant did falsely pretend that he could obtain a protection by favour from the lords of the admiralty by feeing the clerks, as he had an uncle a lord, and that it would be no great expense." Now that is a pretence consisting of several facts, part of which may be true and part false. It may be true that he had an uncle a lord of the admiralty, and if he had, it does not follow that the rest may not be true; therefore the indictment should have charged what part was false. It is perfectly true that the indictment might negative, one by one, every one of the false pretences, and that that would not vitiate, though some were true. But the Court will not suppose that that will be done if it be in the knowledge of the prosecutor that some of them are true. Therefore it shall be stated in the indictment, which are true and which false, in order to apprise the defendant of the particular branch of the charge meant to be insisted on. I cannot see why the same rules which have been observed so long, and recognized by the Legislature as necessary in the crime of perjury, should not be adopted in this case. In perjury it is [\* 390] not enough \* to use the word "falsely" without going on by averment to negative that which is false. A person has deposed on oath to a variety of things: in order to assign perjury it must be shown what part is charged as false. Although it is competent for the party to allege that the whole is false, yet the law will not presume that he will do that; and therefore it is necessary to show which is false that the party indicted may be apprised of it. If this argument required any additional strength it would derive it from the constant course of precedents, as we'll on this statute as on the statute of perjury. This, as far as I am aware, is the first indictment of this sort, and, as it appears to me, is erroneous; and therefore I think that this judgment must be reversed.

BAYLEY, J. I entirely agree that judgment ought to be reversed.

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I think the rule is, that the defendant ought to be apprised of the charge, and that this indictment does not apprise him. Upon an indictment for obtaining money under false pretences, the whole assertion which induces the party to part with his money must be stated, part of which may be true and part false: if falsehood be an ingredient contributing to the obtaining the money that will be sufficient. Here it is contended that the word “falsely” imports that falsehood pervades the whole allegation. If I were satisfied that that proposition were correct I might then be of a different opinion; but the form of indictment for perjury satisfies me to the contrary, because it states that the defendant falsely swore upon the whole matter, and yet that does not amount to negating the truth of the whole, but the indictment goes

\* on by averment to negative each particular. That [\* 391] shows that the general allegation by the word “falsely” does not necessarily pervade the whole. If it does not, then it is a duty owing to the defendant to point out in what particular it is meant to rely on the falsehood, otherwise he cannot be apprised of it. It is very true, that on this indictment the false pretences only consist of five or six propositions, but it would be the same thing if it consisted of twenty times the number. The analogy to the case of perjury is so strong as to afford a safe rule. I cannot see any material distinction between the cases. Upon this short ground, then, that the word “falsely” does not import that the whole of the allegation is untrue, I am of opinion that in this case it should have been pointed out what is untrue.

DAMPIER, J. This indictment states that the defendant falsely pretended, &c., by means of which false pretences he obtained divers promissory notes and money, &c. I was at first struck with the argument that the allegation that he falsely pretended negatived the whole, and was in effect the same as if the indictment had gone on to negative every part. And if such had been its effect, then the language of LAWRENCE, J., in *Rex v. Airey*, would have applied. But on consideration of the precedents in cases of perjury, I think that is not its effect. There is a close analogy between this and the case of perjury: in both falsity forms the main ingredient, but need not pervade the whole; in both, therefore, it is necessary to point out what is false. The 23 G. II., c. 11, which mentions that there must be proper averments, shows that the single word “falsely” prefixed to the oath in the case



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[\* 392] of perjury, and so in \* this case to the false pretence, is not an apt averment to negative the truth of the whole. Upon every indictment for perjury which I have ever seen it has always been alleged that the defendant falsely swore, &c.; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the party can falsify, admitting the truth of the rest; therefore that shows that the word "falsely" in the preceding part of the indictment does not import that the whole is false; for if it did, the effect of the word falsely, pervading the whole, would not be taken off by the subsequent averments as to part, so as to leave the rest true; and if that were so, all such averments upon indictments for perjury would be superfluous, and it would be enough to allege that he falsely deposed to the whole matter. But it may be necessary to set forth the whole matter, though some of the circumstances have a real existence in order to make the rest intelligible; the word "falsely" therefore does not import that everything which is comprehended under it is false; and therefore it appears that the averment in perjury is necessary to show what is false. So in this case, for the same reason, it is necessary to point out by averment what it is that the prosecutor charges as the false pretence, and what the defendant ought to come prepared to defend. And because this indictment contains no such averment, I think it is ill.

*Judgment reversed.*

**Heymann v. Reg.**

L. R., 8 Q. B. 102-106 (s. c. 28 L. T. 162; 21 W. R. 357; 12 Cox. C. C. 383).

*Criminal Law. — Indictment. — Defects cured by Verdict.*

[102] There is no distinction between civil and criminal pleadings as to defective allegations which are aided by verdict at common law.

Indictment that "defendant and others unlawfully and wickedly did conspire and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against defendant, fraudulently to remove part of the property of defendant to the value of £10, that is to say [enumerating divers articles], defendant then being a trader and liable to become a bankrupt."

To this there was a plea of not guilty and a verdict of guilty and judgment. Error was brought on the ground that there was no allegation that defendant was ever adjudged bankrupt: —

*Held*, that the fact of defendant having been adjudged a bankrupt was not necessary to complete the offence of conspiracy; it was complete if the persons

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charged had agreed to remove the goods in contemplation of an adjudication being obtained; and that this, though not expressly alleged, must be taken after verdict, to have been proved before the jury; and that the defect was therefore cured by verdict.

Writ of Error by the defendant on a judgment in an indictment for conspiracy.

The first count of the indictment alleged that Moritz Heymann and others named therein, on the 2d of January, 1872, "unlawfully and wickedly did conspire, combine, confederate, and agree together, contrary to the provisions of the Debtors Act, 1869,<sup>1</sup> and within four months next before the presentation of a bankruptcy petition against the said M. H., fraudulently to remove part of the property of the said M. H., to the value of £10 and upwards, that is to say, divers [enumerating different articles], he the said M. H. then and there being a trader, and liable to become bankrupt, against the peace of our Lady the Queen."

The second and fourth counts were in similar terms, for  
\* conspiring to conceal part of the property of M. H.; [\*103]  
and for conspiring to fraudulently dispose of goods obtained  
by M. H. on credit.

Plea, not guilty.

Verdict of guilty of the premises in the first, second, and fourth counts charged, and judgment of eighteen months' imprisonment on each count.

The assignments of error were, that the indictment was not sufficient in law; that the object of the conspiracies alleged in the three counts was to commit offences under s. 11 of 32 & 33 Vict. c. 62, s. 11, subs. 4, 5, and 15, which section is limited to persons who have been adjudged bankrupt, whereas in neither of the counts it is alleged that defendant had been adjudged bankrupt. That there was no allegation that any creditor of defendant, entitled to petition, had presented a petition to the Court of Bankruptcy. That there was no allegation that defendant had been trading and was a debtor in £50, or that he had committed an act of bankruptcy. That there was no allegation that defendant and the other persons knew, at the dates of the alleged conspiracies,

<sup>1</sup> By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, "Any person adjudged bankrupt . . . shall in each of the cases following be deemed guilty of a misdemeanor. . . . 5. If after the presentation of a bankruptcy petition against him. . . or within four months next before such presentation, he fraudulently removes any part of his property of the value of £10 or upwards."

that defendant was a person to whom s. 11 of the Debtors Act, 1869, applied.

Jan. 22. Besley, for the plaintiff in error. The indictment is not for an offence under the Debtors Act, 1869, but for a conspiracy to commit offences under that Act, and s. 19 of that Act does not apply. It is an indictment at common law, and the facts must be alleged with all the particularity necessary to constitute the offence. In the first place, it is not alleged that any petition was ever presented, or that any adjudication in fact took place. In *Rev v. Jones*, 4 B. & Ad. 345, there was an allegation that the defendant had been adjudged a bankrupt by the commissioners, and that was held insufficient after verdict, as it ought to have been alleged that he was in fact and law a bankrupt. *Rev v. Mason*, 2 T. R. 581; 1 R. R. 545, and *Reg. v. Peck*, 9 A. & E. 686, show what particularity is necessary.

[MELLOR, J. Those cases are virtually overruled by later cases.]

No doubt *Sydserriff v. Reg.*, 11 Q. B. 245, is scarcely [\*104] consistent with *Reg. v. Peck*, 9 A. & E. 686; but that case is not noticed in the judgment of the Court.

[BLACKBURN, J., referred to *Nash v. Reg.*, 4 B. & S. 935; 33 L. J. M. C. 94.]

There the indictment was held cured by 7 Geo. iv. c. 64, s. 21. But the present indictment is not for an offence created by any statute, so that the statute of Geo. iv. does not apply. The indictment is at common law, and is therefore bad for not stating all the ingredients of the offence, *inter alia*, that a petition was presented and the defendant adjudged a bankrupt.

[BLACKBURN, J. That would be necessary to complete the offence under the statute; but in a conspiracy the offence may be complete although the contemplated crime is not committed. Why is it not a conspiracy to conspire to remove goods four months before a contemplated bankruptcy of the owner?]

Possibly it is; but there is no allegation that they conspired in contemplation of bankruptcy.

[BLACKBURN, J., referred to Com. Dig., tit. "Pleader" (C. 87), "By verdict;" and 1 Wms. Saunders, 228, n. (1), as to defects aided by verdict at common law.]

That only applies to civil pleadings.

[BLACKBURN, J. I know of no distinction between civil and criminal pleadings as to this. Is there any authority for saying there is any distinction?]

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In 1 Chit. Crim. Law, p. 172, it is said, "It is further laid down that an indictment ought to be certain to every intent, and without any intendment to the contrary; and that it ought to have the same certainty as a declaration; for all the rules that apply to civil pleadings are applicable to criminal accusations. The last observation does not, indeed, sufficiently express the degree of precision required; for technical objections have been more frequently admitted to prevail in criminal than in civil proceedings, and it was expressly laid down by Lord MANSFIELD, 1 Leach, at p. 134, that a greater strictness is required in the former than is necessary in the latter; and in the first a defendant is allowed to take advantage of mere formal exceptions."

\* Jan. 25. Bromby, in support of the indictment, was [\* 105] not heard.

BLACKBURN, J. This was a writ of error, argued on behalf of the plaintiff in error on the last crown paper day before the LORD CHIEF JUSTICE, my Brothers MELLOR, QUAIN, and myself; and at the conclusion of the argument we said we would consider whether it was necessary to hear counsel in support of the conviction, and we have come to the conclusion that there is no occasion to hear counsel.

The indictment was for conspiracy; and I need not cite any authority for the proposition, that a conspiracy is an offence that is complete as soon as there is an agreement to do a thing which would be, if done, though not a crime, such a matter as would bring the agreement to do it within the definition of conspiracy. Here the defendant has been convicted upon an indictment containing several counts, but all the objections raised apply in effect to the first count. [The learned Judge read the count.] On that there is a plea of not guilty, and a verdict of guilty.

The Debtors Act, 1869 (32 & 33 Vict. c. 62), by s. 11, subs. 5, enacts, that a person who has been adjudged a bankrupt, if he has within four months next before the presentation of the petition fraudulently removed his goods, shall be guilty of a misdemeanour. It is clear, that if the agreement, alleged in the count, to enable him to remove his goods, was come to in contemplation of an expected adjudication, the offence would be at once complete, whether adjudication followed or not. The objection to the count, therefore, is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and



if the question had arisen upon demurrer, I am not quite prepared to say that that might not have been a good objection. But it is a general rule of pleading at common law, — and I think it necessary to say, where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases, — where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the [\* 106] Court after verdict that the \* verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict. The authorities upon that position and the principles on which it proceeds, are to be found in 1 Williams's Saunders, at p. 228, n. (1). In the present case, if this agreement was in contemplation or expectation of an adjudication, there is no doubt that the offence was committed. The averment in the count is, that the defendant and the others confederated and agreed contrary to the Debtors Act, 1869; and it was a confederacy and agreement fraudulently to remove the defendant's goods contrary to the Act, he being a trader liable to become bankrupt; but it is not expressly stated that it was in contemplation of a petition, but only that it was within four months of the petition. We think, upon the issue of not guilty, the jury could not have found that there was a conspiracy to remove the goods fraudulently and in contravention of the statute, unless it had been proved that it was in contemplation that an adjudication was to ensue. If it was in the contemplation of the parties that an adjudication should take place hereafter the offence was committed, whether the adjudication followed or not, for the conspiracy is complete as soon as the parties have agreed. We therefore think that the objection comes to nothing, and the conviction must be affirmed.

*Judgment affirmed.*

#### ENGLISH NOTES.

The cases referred to in the notes to *Reg. v. Gray*, No. 7, p. 113 *et seq. ante*, may be consulted on the points dealt with in the rule now under consideration.

It may be stated as a general rule that every fact or circumstance which is a necessary ingredient in the offence must be set out in the indictment. The exceptions formerly cited were, 1. That a man

might be indicted as “a common barretor” without detailing the particulars of the barrettry. 2. That a woman might be indicted for being “a common scold” without detailing particulars of her conduct. 3. That a person may be indicted for keeping a common gambling-house or bawdy-house, without stating those circumstances which it may be necessary to give in evidence to show that it is a house of that description. *Hawkins*, P. C. c. 25, ss. 57, 59.

So in inciting or soliciting the commission of an offence it is sufficient to charge the incitement or solicitation, without showing that the offence was committed. *Rex v. Higgins* (1801), 2 East 5, 6. R. R. 358.

By certain statutes the charge may be stated generally. This is the case in murder or manslaughter: 24 & 25 Vict. c. 100, s. 6. A similar rule applies respecting offences against the bankruptcy law: 32 & 33 Vict. c. 62, s. 19.

Before considering the manner in which an indictment may be challenged, it is to be observed that many objections which would formerly have been open to the defence must now be taken before verdict, or may be defeated by amendment. By 7 Geo. IV. c. 64, s. 19, misnomer of the defendant or prisoner is now matter of amendment. The same Act provides sect. 21: “No judgment after verdict upon any indictment or information for any felony or misdemeanour shall be stayed or reversed for want of a *similiter*, nor by reason that the jury process has been awarded to the wrong officer, upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.” See *Reg. v. Goldsmith* (C. C. R. 1873), L. R., 2 C. C. R., 74, 42 L. J. M. C. 94, 28 L. T. 881, 21 W. R. 791. By 11 & 12 Vict. c. 46, s. 4, any Court of oyer and terminer, and general goal delivery, may cause the indictment or information of any offence whatever, when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be amended in such particular, and after such amendment the trial is to proceed as if there had been no variance. A like power was conferred on Courts of general or quarter sessions by 12 & 13 Vict. c. 45. By 14 & 15 Vict. c. 100, s. 25, every objection to any indictment for any formal defect apparent on the face thereof must be taken by demurrer or motion to quash before the jury are sworn, and

not afterwards. The section also enables the Court to amend the indictment in this particular. By sect. 1 of the same Act the Court has power to amend certain variances not material to the merits, and by which the defendant or prisoner cannot be prejudiced.

The 14 & 15 Vict. c. 100, s. 24 enacts: "No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words, 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of, 'against the form of the statutes, or *cire versá*,' nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case, where the value or price, or the amount of the damage, injury, or spoil, is not of the essence of the offence." It has been held that the conclusion "against the form of the statute" may now be omitted. *Castro v. Reg.* (H. L. 1881), 6 App. Cas. 229, 50 L. J. Q. B. 497, 44 L. T. 350, 29 W. R. 669, 14 Cox, C. C. 546.

The omission to state every necessary ingredient of a crime may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error. The practice of demurring generally is seldom followed, because the judgment is final in cases of felony. *Reg. v. Faderman* (1850), 1 Den. 565, 3 Car. & K. 353, 4 Cox, C. C. 359, 19 L. J. M. C. 147. There have been cases however in which a prisoner who has had judgment given against him on demurrer to an indictment for murder or felony has been allowed to plead over. *Reg. v. Phelps* (1841), Car. & M. 180, *Reg. v. Purchase* (1842), Car. & M. 617. This originated at a time when felonies were capital, and was *in favorem vitæ*: per Lord ELLENBOROUGH, CH. J., *Rex v. Gibson* (1806), 8 East, 107, at p. 111. In a case of misdemeanour a defendant has been granted leave to demur, with liberty to plead over if judgment went for the Crown. *Reg. v. Inhabitants of Tryddyn* (1852), 3 Bail. Ct. C. 19, 21 L. J. M. C. 108. The Court of Crown Cases Reserved will not review a judgment for the Crown given on demurrer, and the defendant or prisoner is left to his writ of error. *Reg. v. Faderman, supra.*

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As instances of motions in arrest of judgment, may be cited *Rex v. Osmer* (1804), 5 East 304, 1 Smith 555; *Rex v. Cheere* (1825), 4 B. & C. 902. If the defendant fails to obtain judgment on a motion in arrest of judgment, he may still proceed by writ of error. *Reg. v. Martin* (1849), 1 Den. 398, 18 L. J. M. C. 137. It was after a motion in arrest of judgment, that the proceedings in error were taken in *Bradlaugh v. Reg.* (C. A. 1878), 3 Q. B. D. 607, 38 L. T. 118, 26 W. R. 410.

After judgment the record can only be removed by writ of error. *Rex v. Inhabitants of Seton* (1797), 5 R. C. 528, (7 T. R. 373, 4 R. R. 466). A writ of error is a prerogative writ, and the granting or refusal of it is in the discretion of the Attorney General in England or the Lord Lieutenant in Ireland. *Ex parte Newton* (1855), 1 El. & Bl. 869, 16 C. B. 97, 24 L. J. Q. B. 246, 24 L. J. C. P. 148; *In re Piggott* (L. C. Ir. 1868), 11 Cox, C. C. 311, 19 L. T. 114. A writ of error may be quashed for matters *dehors* the record. *Allegue v. Reg.* (Ex. Ch. 1855), 5 El. & Bl. 397, 24 L. J. Q. B. 282, Dears. C. C. 505, 1 Jur. N. S. 869. Where an indictment contains several counts it cannot be assigned for ground of error that no verdict has been given on some of them, provided a verdict has been given on a good count, and judgment has been given accordingly. *Latham v. Reg.* (1864), 5 B. & S. 635. Where an indictment contains two counts properly joined, and the jury returns a general verdict of guilty, this is as effective as if a separate verdict had been returned on each count. *Castro v. Reg.* (H. L. 1881), 6 App. Cas. 229, 50 L. J. Q. B. 497, 44 L. T. 350, 29 W. R. 699, 14 Cox, C. C. 546.

The defendant or prisoner may have an indictment quashed on motion. The Court will quash an indictment, even after plea pleaded, for a clear defect of jurisdiction, either apparent on the record, or shown by affidavit. *Reg. v. Keane* (1864), 4 B. & S. 947, 33 L. J. M. C. 115, 9 Cox, C. C. 433, 10 Jur. N. S. 724. So an indictment may be quashed on motion if it discloses no indictable offence. *Rex v. McDonald* (1765), 3 Burr. 1645; *Reg. v. Hall* (1891), 1891, 1 Q. B. 747, 60 L. J. M. C. 124, 64 L. T. 394, 17 Cox, C. C. 278. If there is no obvious defect in the indictment, or the case is a doubtful one, the motion will be refused and the defendant left to his writ of error. *Reg. v. Burnby* (1843), 5 Q. B. 348, 13 L. J. M. C. 29, Dav. & Mer. 362, 8 Jur. 240; *Reg. v. Keane, supra*.

Every fact and circumstance which is not a necessary ingredient in the offence may be rejected as surplusage. *Rex v. Parker* (1870), L. R., 1 C. C. R. 225, 39 L. J. M. C. 60.

The facts and circumstances must be set out in the indictment in such a manner as not only to permit the prisoner or defendant to know what the charge is, but also that it shall appear upon the production of



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the record whether a plea of a previous acquittal or conviction is supported. *Rex v. Home* (H. L. 1777), Cowp. 672. Uncertainty in one count cannot be aided from descriptions contained in another count. *Reg. v. Waters* (C. C. R. 1848), 1 Den. C. C. 356, 18 L. J. M. C. 53. After verdict, however, a defective averment may be aided by reference to sufficient averments in a preceding count. *Reg. v. Inhabitants of Wareton* (C. C. R. 1851), 2 Den. C. C. 341, 21 L. J. M. C. 7.

It remains to note the jurisdiction of the Court for the consideration of Crown Cases reserved. The statutory provisions now in force are 11 & 12 Vict. c. 78: 36 & 37 Vict. c. 66, s. 47; and 44 & 45 Vict. c. 68, s. 15. The jurisdiction and authority under these Acts in relation to questions of law arising on a criminal trial, is vested in the judges of the High Court, and may be exercised by five or more of such judges. The LORD CHIEF JUSTICE must be a member of the Court, unless by writing under his hand or by the certificate in writing of his medical attendant, it appears that he is prevented, by illness or otherwise, from being present. The LORD CHIEF JUSTICE was not present on the re-argument of *Reg. v. Cor* (C. C. R. 1884), 14 Q. B. D. 153, 54 L. J. M. C. 41, 52 L. T. 25, 33 W. R. 396, 15 Cox. C. C. 611. The statute 11 & 12 Vict. c. 78, s. 1, enacts: "When any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer and gaol delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration [of the Court which under the later acts is constituted as above mentioned]; and thereupon shall have authority to respite execution of the judgment on such conviction; or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the Court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the Court shall think fit, conditioned to appear at such time or times as the Court shall direct, and receive judgment, or to render himself in execution as the case may be."

It has been held that a case may be stated by a recorder: *Reg. v. Masters* (C. C. R. 1848), 1 Den. C. C. 332, Car. & K. 930, 12 Jur. 942, or by a Court appointed by special commission: *Reg. v. Bernard* (1858), 1 Fost. & F. 240.

The question or questions of law reserved, with the special circumstances upon which the same have arisen, are to be certified in a special case. 11 & 12 Vict. c. 78, s. 2. This case may be sent back for amendment. 11 & 12 Vict. c. 78, s. 4. The Court, for the purpose of assist-

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ing its judgment, will look at the indictment, although it is not set out in the case. *Reg. v. Williams* (C. C. R. 1850), 20 L. J. M. C. 106, 2 Den. C. C. 61, Temple & M. 382. The Court is bound to examine the validity of the indictment, although no question upon it is reserved. *Reg. v. Webb* (C. C. R. 1849), 18 L. J. M. C. 39, 1 Den. C. C. 338, 2 Car. & K. 933, 13 Jur. 42. After judgment for the Crown on a demurrer to the indictment, the Court will remit the prisoner to his remedy by writ of error, and has no power to review the decision. *Reg. v. Faderman* (1850), 19 L. J. M. C. 147, 1 Den. C. C. 565, Temple & M. 286, 3 Car. & K. 353, 14 Jur. 377. And where a prisoner has pleaded guilty to an indictment, no question can be submitted to the Court. *Reg. v. Clark* (C. C. R. 1866), L. R., 1 C. C. R. 54, 36 L. J. M. C. 16, 12 Jur. N. S. 946, 15 L. T. 190, 15 W. R. 48. Both *Reg. v. Faderman* and *Reg. v. Clark* proceeded on the ground that the prisoner had not been “convicted,” nor had the question “arisen on the trial.” In *Reg. v. Mellor* (C. C. R. 1858), 27 L. J. M. C. 121, Dears. & B. C. C. 468, 7 Cox, C. C. 454, 4 Jur. N. S. 214, an important question of jurisdiction was discussed in the judgments of the fourteen judges who formed the Court of Crown Cases Reserved. The point reserved was whether there was a mis-trial, by reason that a jurymen had answered to the name of another jurymen, and had been accordingly sworn and included in the panel. The mistake had not been observed at the time of the trial, and had only been discovered the following day. Six judges thought there was a mis-trial and that there should be a new trial: six judges held that the matter was concluded by *Hill v. Yates* (1810), 12 East 229, 11 R. R. 371, and the *Case of a jurymen* (1783), cited in a note to *Hill v. Yates*. POLLOCK, C. B. and WILLIAMS, J., rested their judgments entirely on the ground that the point was not ‘a question of law which arose on the trial’ within the meaning of the Act, and that the Court had therefore no jurisdiction. In this view the four of the six judges who thought there had been no mis-trial concurred, and the remaining two judges expressed the inclination of their minds to assent to this view. The conviction was accordingly confirmed.

The Court trying the prisoner is not bound to bail the convict pending the decision on the point reserved, although he was entitled to be admitted to bail as of right prior to his trial. *Reg. v. Bird* (1850), 5 Cox, C. C. 11. It seems doubtful whether the Court of Crown Cases Reserved has power to admit a prisoner to bail. It has, however, been decided that bail will not be granted by a brother judge at a subsequent assize without the assent of the judge who tried the prisoner. *Reg. v. Harris* (1849), 4 Cox, C. C. 21.

An application to amend a case reserved should be made to the judge

reserving. *Reg. v. Smith* (C. C. R. 1850), 4 Cox, C. C. 42, 1 Den. C. C. 570, Temple & M. 214, 14 Jur. 92. But the Court will send it back where it appears, upon the argument, that it is imperfectly stated. *Reg. v. Hilton* (C. C. R. 1858), Bell, C. C. 20. The Court will not, however, do so if the objection is beside the merits. *Reg. v. Brummitt* (C. C. R. 1861), 8 Cox, C. C. 413, Leigh & C. 9, 3 L. T. 679. Where a case has been restated by order of the Court, an application, supported by affidavit to have it again restated, will be refused. *Reg. v. Studd* (C. C. R. 1866), 14 L. T. 633, 14 W. R. 806.

The Court has entertained questions reserved although no counsel has appeared to argue, and also in the absence of counsel for the prosecution or for the prisoner.

In *Reg. v. Barrell* (C. C. R. 1863), Leigh & C. 354, 9 L. T. 426, 12 W. R. 149, it was said that in the event of a difference of opinion among the judges on a point of law, the case would be argued before the fifteen judges, but where the judges differed on a question of fact the opinion of the majority should prevail. This course has not however always been followed. *Reg. v. Ryland* (C. C. R. 1867), L. R., 1 C. C. R. 99, 37 L. J. M. C. 10, 17 L. T. 219, 16 W. R. 280, 10 Cox, C. C. 569. The Court has directed an important question to be re-argued before a fuller Court. *Reg. v. Cox* (C. C. R. 1884), 14 Q. B. D. 153, 54 L. J. M. C. 41, 52 L. T. 25, 33 W. R. 396.

The close connection between averments and evidence, which formerly rendered a variance fatal to the prosecution, is in part destroyed by statute. It is now enacted that, in certain cases, a variance shall not entitle a prisoner to be acquitted, if the evidence shows him to have committed a kindred offence. Thus by the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 9, a prisoner indicted for rape or for the defilement of a girl under thirteen years of age, may be found guilty of an indecent assault. So upon an indictment for larceny, if it appears that the offence was embezzlement, the jury need not acquit but may return as their verdict, that the prisoner is not guilty of larceny, but is guilty of embezzlement. Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 72. By section 88 of the same statute, a person indicted for obtaining any chattel, money, or valuable security by false pretences is not entitled to be acquitted if it is proved that he obtained the property in such a manner as to amount in law to larceny.

#### AMERICAN NOTES.

"If an indictment imperfectly alleges anything necessary to be proved, this is *aided* or *cured* by verdict for the government. But an entire omission of anything essential is not so aided. The verdict only cures defective statements." Browne on Criminal Law, p. 127. "Verdict cures an imperfect

No. 10. — *Rex v. Brisac and Scott.* — Rule.

averment where the verdict could not have been found without proof of the averment perfectly made; but not so of the total *omission* of an essential averment." Id. p. 103. The same doctrine is stated by Wharton (3 Criminal Law, sect. 3201, quoting from the Heyman case). The doctrine was applied in *Lutz v. Com.*, 29 Pennsylvania State, 441, where an indictment for murder charged the infliction by the prisoner of a mortal wound on O'L., "of which mortal wound," he said O'L. languished from the 27th to the 28th of June, 1856, and languishing did live, and then immediately added: "on which said 28th day of June, in the year aforesaid, the said R. O'L. in the county aforesaid died." It was held that verdict cured the omission of the copulative conjunction "and" between the charge of the wound and that of the death. The Court cite *Queen v. Waters*, 1 Dennison C. C. 361. So in *Conner v. State*, 25 Georgia, 515; 71 Am. Dec. 184, where the presentment charged the commission of the offence as of a day subsequent thereto.

A complaint alleging that defendant made an assault on a designated person, and did beat, bruise, wound, and ill-treat him, with intent to do great bodily harm to him less than murder, instead of less than the crime of murder, as provided by How. (Mich.) Ann. Stat. § 9122a, -- is sufficient after verdict. *People v. Sutherland* (Michigan), 62 N. W. 566.

"It is certainly an indispensable requisite of an indictment of this character that there must be an absolute negative of the truth of the pretences employed." *Tyler v. State*, 2 Humphreys (Tennessee), 37; 36 Am. Dec. 298; *People v. Stone*, 9 Wendell (New York), 182; and *People v. Haynes*, 11 id. 557, both citing the Perrott case. In the Stone case the Court said: "It is not sufficient to set forth that the defendant *falsely pretended*, &c., setting forth the means used, and then to aver that by the means of *such false pretences* he obtained the property; but the pleader must go on as in an assignment of perjury, and falsify by specific and distinct averments such of the pretences as he intends to prove upon the trial were used and were false." See *Pattee v. State*, 109 Indiana, 545; *State v. Webb*, 26 Iowa, 262; *State v. Bradley*, 68 Missouri, 140; *State v. Pickett*, 78 North Carolina, 458; *Redmond v. State*, 35 Ohio State, 81; *State v. Levi*, 41 Texas, 563; *State v. Metsch*, 37 Kansas, 222.

## No. 10. — REX v. BRISAC AND SCOTT.

(K. B. 1803.)

## RULE.

AN information at common law for a conspiracy laid in the King's Bench is well triable in an English county where acts were done by innocent persons, which were the intended consequence of the acts of the conspirators, although the immediate acts of the conspirators were done on the high seas.



**Rex v. Brisac and Scott.**

4 East, 164-172 (s. c. 7 R. R. 551).

*Criminal Law. — Conspiracy — Venue. — Place of Trial.*

[164] An information at common law for a conspiracy between the captain and purser of a man-of-war for planning and fabricating false vouchers to cheat the Crown (which planning and fabrication were done upon the high seas), is well triable in Middlesex, upon proof there of the receipt by the Commissioners of the Navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there by a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he there received.

The defendant, Captain Brisac, was brought up on a former day of the term to receive judgment, after verdict, upon an information filed against him and the other defendant, Scott; the first count of which stated in substance, that the defendant, Brisac, was captain, and the defendant, Scott, purser of his Majesty's ship, *Iris*, then at sea, and lying in Brassa Sound. That it was the duty of Scott as purser to procure provisions for the supply of the ship's company, and to draw bills of exchange on the Commissioners of the Navy for payment: also to procure true receipts from the persons of whom he bought such provisions, witnessed by two of the commission or warrant officers of the ship, to express the quantity and prices of such provisions; also to procure true certificates from two of the principal merchants and inhabitants of the place where such provisions had been bought, that the prices charged in such account were only the then current prices of such articles at that place: also to procure true certificates from the commander, master, and boatswain of the ship, specifying the several species and quantities of such provisions, and that the same had been actually received on board at the time therein mentioned: and also to procure true certificates from the captain that such bills of exchange were drawn by his order and for the purpose of paying for such provisions, and to send the same to the commissioners for victualling the navy for vouchers, &c. That the defendant, Brisac, as captain, was in a place of great trust, and that it was his duty [\*165] as such \*to sign true certificates to the commissioners that the bills drawn by Scott on them were drawn by his order, and in payment for the provisions therein mentioned: and

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also certificates specifying the several species and quantities of provisions, &c., and that the same had been actually received on board the ship at the times therein mentioned. That both defendants, not regarding their duties, but fraudulently and deceitfully contriving and intending to cause it to be believed that the defendant, Scott, as such purser, had bought of one J. Ross a much larger quantity of fresh beef, &c., at higher prices than he actually had, for the use of the ship, in order thereby to defraud the King, with force and arms, on the 17th of October, 1800, at Brassa Sound (ss. at Westminster), did conspire, &c., together, to charge his Majesty with the payment of more money than was really due or payable for any provisions, &c., in fact procured for the use of the ship's company. That the defendant, Scott, in pursuance of such conspiracy then falsely and fraudulently signed a paper writing purporting to be a bill of exchange upon the commissioners, &c., without inserting therein any particular sum of money, but leaving a blank to be afterwards filled up by the insertion of any sum of money therein, and which was made payable to the said J. Ross or order as for fresh beef, &c., supplied for his Majesty's ship the *Iris*. That the defendant, Brisac, in pursuance of the conspiracy, before any sum of money was inserted in the said bill of exchange, falsely and fraudulently signed a certificate at the foot of the said bill that it was drawn by his order, and for the purposes therein-mentioned: that both the defendants, before any quantity of provisions had been bought by Scott as such purser at any price whatever, &c., at Lerwick in Shetland, falsely, &c., procured the said J. Ross, R. L., the master, and \* I. C., boatswain, [\* 166] being warrant officers of the said ship, to sign a certain other paper purporting to be a receipt from Ross, witnessed by R. L. and I. C. for a set of bills of exchange on the commissioners for victualling the navy in favour of Ross, without specifying any sum of money, but leaving a blank to be afterwards filled up, and which was mentioned to be for certain provisions thereby supposed to have been therein-above written, and to have been delivered on board the said ship at certain prices, &c. That both the defendants, before any account of any quantity of provisions had been thereon written, procured N. S. and J. M. to sign a certificate at the foot of the said last-mentioned paper writing, purporting to be a certificate in the names of them therein described to be two of the principal merchants and inhabitants of Lerwick, expressing that the

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prices charged in a certain account thereby supposed to have been above written, were only the then current prices of those articles at that place. That the defendants, before any account of any quantity of provisions bought by the defendant, Scott, of the said *J. Ross* had been thereon written, falsely, &c., did cause *R. L.* and *I. C.*, being master and boatswain, to sign, and both the defendants as captain and purser did also sign a certain other certificate to the Commissioners of the Navy expressing that the several species and quantities of provisions therein mentioned were actually received on board his Majesty's ship, *Iris*, in kind between the 20th of September and 7th of October, 1800. That the defendants afterwards caused to be inserted in the blank so left in the said bill of exchange the sum of £558 6s. 4*d.*, whereby the bill of exchange was made to purport to be a bill of exchange drawn by Scott upon the commissioners, &c., for £558 6s. 4*d.*, payable to Ross, &c.; and whereby the certificates so signed [\* 167] \* by the defendant, *Brisac*, at the foot of it was made to purport that the bill was drawn by his order, and for the purpose therein mentioned. That the defendants wrote upon such part of the paper writing as purported to be a receipt from *Ross*, and witnessed by *R. L.* and *I. C.*, a false and fraudulent account (which was set out) amounting to £558 6s. 4*d.* for fresh beef, &c. That the defendants caused to be written in the blank left in the receipt so signed by *Ross*, and witnessed by *R. L.* and *I. C.*, £558 6s. 4*d.*, whereby it purported to be a receipt from *Ross*, witnessed, &c., to the defendant, *Scott*, as purser, for a set of bills of exchange upon the commissioners for victualling the navy for £558 6s. 4*d.*, for provisions delivered on board the said ship, and whereby the said certificate so signed by *N. S.* and *J. M.* was made to purport to be a certificate as from two of the principal merchants and inhabitants of *Lerwick*, that the prices charged in the account therein mentioned were only the then current prices at that place. That the defendants caused to be inserted in the certificate signed by defendant, *Brisac*, *R. L.*, defendant, *Scott*, and *I. C.*, a false and fraudulent account of meat, whereby it was made to purport to be a certificate from the defendant, *Brisac*, *R. L.*, the defendant, *Scott*, and *I. C.* (as such captain, &c.), that the provisions so inserted had been actually received on board the said ship between the 20th of September and 7th of October, 1800, with intent to send the same to the commissioners as and for just and true vouchers

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that the defendant, Scott, had procured such provisions at the prices charged, and that the same had been actually received on board, and that the bill was drawn for the amount thereof; whereas in fact the defendant, Scott, had not as such purser, bought, between the 20th of September and 7th of October of Ross, the provisions in said bill of exchange \* account received, [\* 168] and certificate mentioned, nor any provisions to the value in the bill mentioned, &c. (and so negating the truth of the other facts meant to be established by the vouchers). That in further pursuance of the conspiracy, they caused the said bill of exchange, &c., to be sent to the commissioners for victualling the navy, and published as true vouchers, to wit, at Westminster, &c.

There were various other counts charging in substance the same transaction, or different parts of it. The 11th count charged that the defendants conspired as before, and that in pursuance of the said conspiracy they did knowingly, falsely, and fraudulently send and deliver, and cause to be sent and delivered to the commissioners for victualling, a certain other false and fraudulent bill of exchange with a certain other false and fraudulent certificate thereunder written, and also a certain other false and fraudulent account and receipt, together with a certain other false and fraudulent certificate thereupon indorsed, &c. (setting out the purport of the several instruments, ; viz. the bill of exchange drawn on the commissioners by Scott in favour of J. Ross, and certified by Brisac, for £558 6s. 4d., as for so much victuals, &c., supplied for the *Irís*; and the account made out by J. Ross to that amount, with his receipt, and the certificate of two persons as merchants and inhabitants of Lerwick, certifying the prices charged to be the current prices at the time for the articles); and did then and there utter and publish the same as and for just and true vouchers, &c., with intent to defraud the King; whereas Scott had not bought, &c. (negating the truth of the facts vouched by those papers).

At the trial before LAWRENCE, J., Westminster, the substance of the facts, as stated in the first and eleventh counts, were proved. But all the acts in which either of \* the defendants [\* 169] immediately took a part were done by them either on the high seas at Brassa Sound, or at Lerwick, in the Isle of Shetland. The only acts proved to be done in Middlesex were those which were done by them mediately, through the intervention of innocent persons; namely, the delivery of the vouchers (transmitted through



their hands by the defendants) to the commissioners of the victualling, and the application for and receipt of payment there by the holder of one of the bills of exchange mentioned in the information. Whereupon when the defendant, Captain Brisac (who alone was forthcoming after conviction, the other defendant having absconded since the trial), was brought up for judgment, it was objected by

Best, Serjt., and Marryat, that the whole of the conspiracy, which was the gist of the offence charged in the information, was committed upon the high seas, and therefore under the express provisions of the statutes, 28 Hen. VIII. c. 15, and 39 Geo. III. c. 37, the offence was triable under the Admiralty commission thereby directed. That it made no difference that the ultimate object and completion of the conspiracy was to operate on shore, as all the acts of the defendants themselves which constituted the offence of conspiracy were committed out of the jurisdiction of the common law.

Erskine, Garrow, Jervis, and Peake, for the Crown, resisted the objection; because a conspiracy was an offence not merely resting in the mind, but shown by overt acts done to carry it into execution; and here information stated, that in further pursuance of the conspiracy the defendants caused the false vouchers to be sent to the commissioners for victualling the navy, and did deliver [\*170] the same \* to them, &c., and did utter and publish the same as true: all which were proved to have happened in the county of Middlesex. For the letter conveying the bill of exchange, which had been put into the post at Lerwick by one of the conspirators to be delivered in Middlesex, and which was accordingly there delivered, was an act done there in furtherance of the conspiracy, for which both the conspirators were answerable as much as if it had been delivered there by their own hands: and so the act of receiving the money upon it afterwards at Somerset House by the holder is also imputable to those by whose procuration it was thus done.

The Court then said they would take the objection into consideration; and remanded the defendant to be brought up again on this day; when

GROSE, J., in passing sentence, delivered the opinion of the Court upon the objection. As to the objection which has been suggested by the defendant's counsel (and of which he would have had the full benefit allowed him, if it were available in law,

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although the time for a new trial be long since elapsed) we are of opinion, that it is not sufficient to prevent our giving the judgment of the Court. It is objected that the misdemeanour charged on this indictment was committed on the high seas, and as that offence is, by virtue of the stat. 39, Geo. III., now made triable under the King's commission, to be granted by virtue of the stat. 28, H. VIII., c. 15, that it cannot properly be tried within the body of any county in England. As to which, it may be in the first place observed, that that statute makes no difference in this case; it does not take away any jurisdiction as to the trial of any offences, \*which might have before been tried in the [\*171] courts of common law, because a place and forum of trial is assigned for offences committed at sea, which did not, as to them, exist before. If it were necessary on this occasion to consider how far every count in this information has been established by the evidence adduced, so as to bring every one of them within the jurisdiction of this Court, it would be to be recollected that conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place; and that from analogy, there seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason in compassing and imagining the king's death, or in conspiring to levy war. In the *King v. Bours and others*,<sup>1</sup> the trial proceeded upon this principle; where no proof of actual conspiracy embracing all the several conspirators was attempted to be given in Middlesex, where the trial took place, and where the individual actings of some of the conspirators were wholly confined to other counties than Middlesex: but still the conspiracy as against all having been proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts done by some of them in prosecution of the conspiracy in the county where the trial was had. But upon this occasion it is not necessary to go at large into this point; for the eleventh and other counts in this information charge that \*the defendants fraudulently sent [\*172]

<sup>1</sup> The defendants received sentence in this Court in Trinity term, 1787.

and delivered to the commissioners for victualling the navy a false and fraudulent bill of exchange, and a false and fraudulent account, with false and fraudulent certificates, and published the same as just and true vouchers that Scott had bought the quantities of provisions therein mentioned, and at the prices therein specified; whereas in fact he had not bought such quantities of provisions, nor any provisions at those prices; in order thereby to cheat and defraud the King, in pursuance of a conspiracy between them to charge the King with more money than was due for any provisions bought or procured by the defendant Scott. That the delivery of such false vouchers with such fraudulent intent, in pursuance of a conspiracy for that purpose, is an offence in the place where the vouchers were delivered, is a matter which cannot be doubted; though the conspiracy may have been in another place. And in the present case, the delivering the vouchers, and the presenting the bill of exchange to the commissioners of the victualling office in Middlesex, were the acts of both the defendants, done in the county of Middlesex: I say it was their acts, done by them both; for the persons who innocently delivered the vouchers were mere instruments in their hands for that purpose; the crime of presenting these vouchers was exclusively their own, as the crime of administering poison through the medium of a person ignorant of its quality would be the crime of the person procuring it to be administered.

The sentence then passed on the defendant was, that he should pay a fine of £300, and find sureties for his good behaviour, &c., and be imprisoned in the King's Bench prison eighteen months, and stand once during that time in the pillory.

#### ENGLISH NOTES.

At common law the venue in the margin must have been the county in which the offence was committed, 2 Hale P. C. 180. It is now provided by the Criminal Law Procedure Act, 1851 (14 & 15 Vict. c. 100), sect. 23: "It shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment, provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment." The same statute (s. 24) enacts: "No indictment shall be held insufficient . . .

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for want of a proper or perfect venue." The objection must be taken by demurrer or motion to quash the indictment before the jury are sworn; and the indictment may be amended: s. 25. The objection cannot be taken on motion to arrest judgment: *Reg. v. O'Connor* (1843), 5 Q. B. 16, 13 L. J. M. C. 33. Where however it appears that the Court trying the prisoner had no jurisdiction, these provisions do not apply, and the objection may be taken in arrest of judgment: *Reg. v. Stanbury* (C. C. R. 1862), Leigh & C. 128, 31 L. J. M. C. 88, 5 L. T. 686, 10 W. R. 236, 9 Cox, C. C. 94.

The following are the more important provisions relating to the venue or places of trial of offences. In the case of offences committed in counties or cities, 38 Geo. III. c. 52, 14 & 15 Vict. c. 100, s. 23. In the case of offences against property, 24 & 25 Vict. c. 96, ss. 64, 114; 24 & 25 Vict. c. 98, s. 41. In the case of offences against the coinage Act, 1861 (24 & 25 Vict. c. 99), s. 28. In the cases where it is doubtful where the offence is committed, by reason of proximity to other jurisdictions, 7 Geo. IV. c. 64, s. 12. In the case of offences committed on a voyage or journey; *ib.* s. 13.

The place of trial may be changed by *certiorari*: see Notes to No. 1 & 2 of "Certiorari," 4 R. C. 530.

The following case shows the application of the principles of the ruling case. The prisoner was a clerk to a firm in Middlesex. He collected at York a sum of money on behalf of his employers to whom he should have remitted it. He subsequently wrote to his employers three letters, the last of which was intended to make them believe that he had not received the money. All these letters were received in Middlesex. It was held that the prisoner was rightly indicted of embezzlement in Middlesex. *Reg v. Rogers* (C. C. R. 1877), 3 Q. B. D. 28, 47 L. J. M. C. 11, 37 L. T. 473, 26 W. R. 61, 14 Cox, C. C. 22. With this case may be contrasted *Reg v. Williams* (1810), 2 Camp. 506, 11 R. R. 781, and *Reg v. Holmes* (C. C. R. 1883), 12 Q. B. D. 23, 53 L. J. M. C. 37, 49 L. T. 540, 32 W. R. 372, 15 Cox, C. C. 343, in which cases the place from which the letter was sent was held sufficient to constitute a proper venue.

## AMERICAN NOTES.

The principal case is cited and followed in *Ex parte Rogers*, 10 Texas Court Appeals, 655; 38 Am. Rep. 654. A conspiracy to forge titles to land in Texas was formed in Texas, and one or two overt acts were committed there, but the actual forgery was committed in another State by an agent or co-conspirator, and it was held that the Court of Texas had jurisdiction. The Court said: —

"The case of *Commonwealth v. Harvey*, 8 American Jurist, 69, is one in which the defendant, a resident of New York, forged a draft in Albany and



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placed it in the hands of a broker there to be forwarded to Boston, Mass., where it was paid and the proceeds remitted to the defendant, who did not, during these transactions, leave the State of New York. He was indicted in the State of Massachusetts, for the utterance in that State of the forged draft, and though he was shown to have committed the offence through an agent, the broker, who likewise resided in Albany, and outside the State of Massachusetts, he was held amenable in the latter State, was tried, over an objection to the jurisdiction of Massachusetts Courts, was convicted, and the conviction sustained. As relied upon by the prosecution in the case of *The People v. Adams*, 3 Denio, 190, the adjudication in Harvey's case was assailed vigorously by counsel for the defence as enunciating a principle alike dangerous and unwarranted, and establishing a precedent whereunder a defendant might be held liable to two different jurisdictions for the same offence. But though insisted upon with consummate zeal and ability by counsel, the Court, in the Adams case, in which the issue decided was that the personal presence at the place where the crime was committed was not essential to constitute the offender a principal, did not concur with counsel, or hold that the adjudication in the Harvey case was obnoxious to the weight of authority; and the doctrine enunciated in Harvey's case, as applied to the Adams case, prevailed.

It would be difficult indeed to imagine a case which, in its prominent features, could be more directly in point than the Massachusetts case referred to. In that case the common-law principle *qui facit per alium facit per se*, which is of universal application both in criminal and civil cases (3 Com. 8), was recognized, and the Court maintained jurisdiction over the offence though the paper was forged outside the limits of the State, and was uttered from the place where forged and through the instrumentality of an agent who likewise lived where the paper was forged. The issue in that case was the utterance of a forgery in Boston. It was uttered from Albany, New York, through the medium of an innocent agent, and the defendant was held guilty in Massachusetts. Its criminal intent was to affect the laws of Massachusetts. The issue in this case is the forgery of an instrument designed to affect the laws of this State. Like the utterance in Harvey's case, it was forged from abroad — from Chicago — through the instrumentality of an agent or co-conspirator; the State in this instance resting its position upon the stronger ground that it was likewise forged in pursuance of a previous conspiracy between the agent and the defendant entered into in this State, to do a criminal act, to be consummated here, and which in its results was to effect a vicious purpose in this State only.

*Commonwealth v. Gillespie* is a strong case in point, and thoroughly sustains the doctrine announced in Harvey's case. See 7 S. & R. 469. This was a prosecution sustained in a Pennsylvania Court against a citizen of New York, for selling lottery tickets in Philadelphia through an agent. In asserting the jurisdiction of the Pennsylvania Court, the learned Judge who delivered the opinion pertinently remarked: "For the law would be a dead letter—we would become the laughing-stock of our sister States, either for the inaccuracy and little foresight of our lawmakers, or for the imbecility of

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those employed in their administration, if such a procedure as this was not brought within the law: if our neighbors from New York or Baltimore could levy a revenue in this State by the employment of a child or slave.' . . . It must be recollected, the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place; and if the parties are linked in one community of design and of interest, there can be no good reason why both may not be tried where an overt act is committed."

In *People v. Mather*, 4 Wendell (New York), 229; 21 Am. Dec. 122 (an indictment for abducting Morgan, the Mason who had disclosed the secrets of the order, — an act of great political as well as criminal importance), it was held, citing the principal case, that the venue in an indictment for conspiracy may be laid in the county in which the agreement was entered into, or in any county in which any act was done by any of the conspirators in furtherance of their common design. The Court said: "All these cases must proceed, I think, on the principle that the crime is committed where the overt act is performed. I admit that it is the illegal agreement that constitutes the crime: when that is concluded, the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown, nor even performed, to authorize a conviction. If conspirators enter into an illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted: but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act, there they renew, or perhaps to speak more properly, they continue their agreement," &c.

The principal case was also cited and followed in *People v. Rathbun*, 21 Wendell (New York), 599, 538, where it was held that the crime of forgery of a note in one county, the note being sent by the forger by mail to a person in another county, for the purpose of obtaining credit on it there, is only cognizable in the latter county.

An indictment for false pretences made in one State or county but effectuated in another can only be tried in the latter. *Connor v. State*, 29 Florida, 455; 30 Am. St. Rep. 126. The Court said: —

"If the false pretences are made in one jurisdiction, but the property is obtained in another, the prosecution must, in the absence of such a statute, be instituted in the latter jurisdiction. 7 Am. & Eng. Ency. of Law, 758, 762. In *State v. House*, 55 Iowa, 466, where the property alleged to have been fraudulently obtained consisted of promissory notes and a mortgage securing the notes, the false pretences were made and an agreement of settlement providing for the execution and delivery of the notes and mortgage was executed in Wright County, and afterwards the notes and mortgage were made and delivered to the defendant in Polk County, where he was indicted, tried, and convicted: and it was held that the false pretences made in Wright County were not a crime, that an indictment would not lie there because the notes

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were not obtained there, and that as the crime was consummated in Polk County, by the delivery of the papers in that county, the indictment was properly found there, no matter where the false representations which induced their delivery were made. In *Skiff v. People*, 2 Parker Cr. 139, the county of the delivery of the property was held to be the proper county for the trial of the offence, though the note of the property was not made and delivered until subsequently, and in another county. *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291, decides that where one, by false pretences contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offence of obtaining goods by false pretences is complete in the former county, and the offence must be prosecuted therein, the delivery of the goods to a common carrier being a delivery to the defendant's agent, and hence, in law, a delivery to the defendant. In *People v. Adams*, 3 Denio, 190; 45 Am. Dec. 468, Adams and another were indicted in the City of New York for obtaining money from a firm of commission merchants in that city by exhibiting to them fictitious receipts signed by the other defendant in Ohio, falsely acknowledging the delivery to such other defendants of a quantity of produce for the use of and subject to the order of the firm; and Adams pleaded that he was a natural-born citizen of Ohio, and had always resided there, and had never been in the State of New York, that the receipts were drawn and signed in Ohio, and that the offence was committed by the receipts being presented in New York to the firm by innocent agents there employed by the defendant in Ohio, and the plea was adjudged to be bad, and the indictment to have been properly found in New York; and in entire consistency with this decision it was held in *Stewart v. Jessup*, 51 Ind. 413; 19 Am. Rep. 739, that a person is not liable to conviction and punishment in Indiana for obtaining property under false pretences, where the property has been obtained outside of that State, although the false pretences may have been made within it. See also *In re Carr*, 28 Kan. 1; *State v. Round*, 82 Mo. 679; *State v. Shaeffer*, 89 Mo. 271; *Commonwealth v. Taylor*, 105 Mass. 172; *Commonwealth v. Wood*, 142 Mass. 459; *Commonwealth v. Van Tugel*, 1 Met. (Ky.) 1; 71 Am. Dec. 455."

In *State v. Hamilton*, 13 Nevada, 386, the defendants and others conspired to rob the treasure in carriage by Wells, Fargo & Co., on the road between Eureka and some point in Nye county, Nevada; H. was to ascertain when the treasure left Eureka, and signal his confederates by a fire on the top of a mountain in Eureka county, which could be seen by them in Nye county, thirty or forty miles distant: the signal was so given by him, and his confederates in Nye county attacked the coach and attempted to rob the treasure. It was held that H. was amenable in Nye county.

It is generally held that false pretences, made in one State or county, but effectuated in another, may be punished in the latter, *State v. House*, 55 Iowa, 166; *Adams v. People*, 1 New York, 173; *State v. Grady*, 34 Connecticut, 118 (larceny); *Com. v. Smith*, 11 Allen (Mass.), 243 (subornation of perjury). In *State v. Grady*, *supra*, the Court said: "The general proposition that no man is to suffer criminally for what he *does* out of the territorial

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limits of the county, if applied to a case where the act is completed out of the county, is correct : but it is the highest injustice that a man should be protected in doing a criminal act here because he is personally out of the State. His *act* is here, although he is not. The injustice of the rule has compelled courts of other States to disregard it in cases of great crimes. Thus if a man standing beyond the outer line of one State, discharges a ball over the line and kills another, it has been holden that he was punishable, although the crime was a felony. The reason given for the distinction " (between felonies and lesser crimes) is, " that if the offence is a felony he sustains the relation to it, if performed by a guilty agent who can be punished, of an accessory, and not of a principal, and that as technically an accessory he must be pursued in the county where he committed the enticement. The doctrine has never been recognized in this State, is inconsistent with our system of criminal law, and does not commend itself to our judgment, . . . is vicious and should be repudiated."

In regard to the question whether larceny can be predicated of goods brought into one State when stolen in another, there is, as Mr. Bishop observes, " much mist." He discusses the point at length in 1 Criminal Law, sects. 137-143, his opinion being in the affirmative. On that side are *State v. Bennett*, 14 Iowa, 479; *Watson v. State*, 36 Mississippi, 593; *State v. Newman*, 9 Nevada, 48; 16 Am. Rep. 3; *State v. Cummings*, 33 Connecticut, 260; *State v. Bartlett*, 11 Vermont, 650; *State v. Underwood*, 49 Maine, 181; 77 Am. Dec. 251; *Ferrill v. Commonwealth*, 1 Duvall (Kentucky), 153; *Stinson v. People*, 43 Illinois, 397; *State v. Johnson*, 2 Oregon, 115; *Worthington v. State*, 58 Maryland, 403; 42 Am. Rep. 338; *State v. Hill*, 19 South Carolina, 435; *Graves v. State*, 12 Wisconsin, 591. To the contrary: *Simmons v. Commonwealth*, 5 Binney (Pennsylvania), 617; *People v. Gardner*, 2 Johnson (New York), 477; *State v. LeBlanch*, 31 New Jersey Law, 82; *State v. Brown*, 1 Haywood (North Carolina), 100; 1 Am. Dec. 548; *Simpson v. State*, 4 Humphreys (Tennessee), 456; *Beal v. State*, 15 Indiana, 378; *State v. Reonnals*, 14 Louisiana Annual, 278; *People v. Loughridge*, 1 Nebraska, 11; 93 Am. Dec. 325; *Lee v. State*, 64 Georgia, 203; 37 Am. Rep. 67; *Strouther v. Commonwealth*, Virginia, Sep., 1895.



## CROWN.

- SECTION I. Prerogative.  
 SECTION II. Crown Grants.  
 SECTION III. Crown Appointments.  
 SECTION IV. Proceedings against the Crown.

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 SECTION I. — *Prerogative.*

 No. 1. — ATTORNEY-GENERAL v. SIR GEORGE  
 SANDS.

(EX. 1670.)

## No. 2. — MIDDLETON v. SPICER.

(CH. 1783.)

## RULE.

THE Crown is entitled by escheat to socage lands upon a failure of heirs, and to the chattels of an intestate dying without next of kin.

**Attorney-General v. Sir George Sands.**

Hardres, 488-498 (s. c. 2 Freeman, 129; Tudor L. C. Conv. 760),

*Crown. — Prerogative. — Escheat.*

F. purchased land for a term of 99 years, and afterwards purchased the inheritance which became vested in trustees. By his will F. disposed of these lands to the sons of Sir G. S., born or to be born in his lifetime, and directed the trustees to convey them accordingly. After F.'s death, but before any conveyance made, one of the sons was attainted and executed for killing his brother. *Held*, that there was no forfeiture either of the inheritance or of the term.

[488] Upon an information exhibited here, and proceedings upon it, a case was made and stated, which was to this effect: viz. :—

Sir Ralph Freeman purchased land for the term of 99 years, in his own name; and afterwards purchased the inheritance of the same lands in trust; and then by his will disposed of these lands

## No. 1. — Attorney-General v. Sir George Sands, Hard. 488, 489.

to the sons of Sir George Sands, his grandchildren born, or which should be born in his lifetime, and directed conveyances to be made accordingly by his trustees, and died. At that time Sir George Sands had two sons, Freeman and George; and Freeman died, and after the death of Sir Ralph, Sir George had another son Freeman, who killed his brother George; for which he was attainted and executed, and no conveyances were made, by the trustees, pursuant to Sir Ralph Freeman's will; and the questions hereupon were two.

First, Whether, as this case is, the term for years was forfeited?

Secondly, Whether or no the inheritance in trust were forfeited?

Mr. Winnington, *pro querente*. A trust is defined in 1 Co. Rep. 121 to be an interest annexed in privity to an estate in lands; and the common law takes notice of it. Lit. Sect. 464, *cesta que trust* shall be impanelled on a jury, *vide* Co. Lit. 272. b. 5 Ed. IV. 7. There shall be a *possessio fratris* of a trust, and it was transferable before 27 Hen. VIII. and the second feoffee should be seized to the former use, *vide* 3 Co. Rep. 2, 3., it will pass by grant. And there is a diversity betwixt a privity in estate, and a personal privity; the latter will not go to the King, but the former will; For authority, *vide* 12 Co. Rep. 1. 2., a case cited collaterally; which is contrary to Cro. Jac. 512, 514, where it is held, that a trust of a term is forfeitable, \*but not a [\*489] trust of an inheritance, Anders. 1 p. 294. an use not forfeited for felony, unless it be of a chattel. The term in this case of ours is forfeited; for this is not a term that attends the inheritance; but it is a substantive estate of itself not attending upon or ancillary to the inheritance; for they are severally directed by the party, and Sir Ralph had the term a long time before he purchased the inheritance. *Vide* 1 Ed. IV. 6. 5 Co. Rep. 56.

Ellis, *pro defendente*. First, the trust of an inheritance is not forfeited by felony: First, because to a forfeiture for felony and to an escheat a tenure is requisite. *Vide* 2 Inst. 21., and for that reason a fair or a market are not forfeited; and a trust is not held of any; but the lands in trust. Secondly, if the law were otherwise, there would be a double forfeiture of the same thing; viz., by the trustee, and by the *cesta que trust*, which is unreasonable, and cannot be. *Vide* 14 Hen. VIII. 8. Thirdly, *cestuy que trust* has neither *jus ad rem*, nor *in re*, but remedy in equity only, 11

Hen. IV. 5; 5 Ed. IV. 7; 3 Co. Rep. 2. 3. which does not extend to a paroll trust of lands, tenements, and hereditaments. *Vid.* Bulst. 2 part 830; 21 Car. B. R. *The King v. Holland*; a trust for an alien in fee not forfeited to the King, 2 Cro. 513, nor for felony; but it is grantable over by common use in equity.

Second point. If a trust of a term attend the inheritance, then it is of the same nature with the inheritance; but if it do not attend the inheritance, but be a substantive estate of itself, it is not forfeited; Because it belongs not then to the felon, nor was ever in him, but it goes to the administrator of the termor, which the defendant in this case is; and the felon had no interest in this term by the devise, because he was not then baron. And concluded *pro defendente*.

HALE, CHIEF BARON. The sole question is here, whether the lease attend the inheritance in such a manner, as that the inheritance cannot be forfeited without it, for if it do not so attend it, then does it not appertain to the felon, but to the administrator of him that was slain, or to the trustee in possession; and then this point as to the term will be out of doors. But if it do attend the inheritance, the question will be, to what purpose it does attend it: For to some purpose it does not, as to prevent dower, or to stave off a debt, for such a term, shall be assets, if it attend an inheritance in fee simple; but not if it attends an estate tail; which is not subject to the payment of debts in equity.

[\* 490] \* Afterwards, in Hil. Term, 20 Car. II. regis Serjeant Maynard argued *pro quer.*, that both the inheritance and the lease was forfeited.

There are two reasons why estates are forfeited for felony; one for example, the other for the increase of the King's revenue, in order to the public safety. And I conceive, that although the lease do not wait upon the inheritance, yet it is forfeited in this case, because the defendant, Sir George Sands, who hath the lease as administrator, has it distinct from the inheritance, that was conveyed to him before, and the lease being in him in *auter droit*, it does not drown in the inheritance: for if it did, it would not be assets, but might work a *decastavit*, which the law will not work by any operation: for it will not work a wrong; so that the term is not extinguished. And it is agreed on both sides, that both the lease and the inheritance were in the defendant in trust for his son George.

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Then, secondly, by George his death they are in the defendant in trust for his son Freeman the felon, and notwithstanding the meeting of these two trusts, of a term and of the inheritance, the one does not drown the other.

Then thirdly, a lease for years in trust is forfeitable for felony, for the King's interest, and by his prerogative; and so it was held Pasch. 7. Jacob. in *Sir Walter Raleigh's Case* in Scacc., that a trust of a term is forfeited, and so it was ruled Trin. 11 Jac. in *Abington's Case*: But the case of an inheritance in trust is not resolved. And in 2 Car. 512 it is held that a term in trust is forfeited, but not a fee in trust. Hill. 3 Car. I. Scacc. *Babington's Case*; held that if the King's receiver purchase a lease in trust, it is liable to the King's debts, though it were afterwards alienated. And in Pasch. 12 Car. C. B. in *Sir Anthony Anger's Case*, it is held, that a lease for years of an advowson in trust is forfeited by the outlawry of *cestuy que trust*; but it is held there likewise, that the King cannot have a *Qu. Imp.* or an ejectment, but a subpoena only.

And great regard ought to be had to the King's revenues in this case, because of the consequence of it: And a trust does not hinder a man from granting over the term; as is seen in daily practice. If one obligee commit felony, the whole obligation is forfeited. And it was resolved in Hill. 30 Eliz. B. R. that matter of account is forfeitable to the King by outlawry, though not transferable by grant, as a trust of a term is.

\* And if it be so, that the trust of a term is forfeitable, [\*491] then the question will arise betwixt the felon and the King, whether of the two shall be preferred: and it is clear, that the felon cannot have a trust against the King, and the trustee can have no colour to withhold it from both the felon and the King, and the King may pardon and restore it to the felon, by which means the trustee would lose the benefit of it. And certainly, in all reason, the King ought to be preferred before the felon, for otherwise, the punishment of felony and the interest of the King's revenue would be both avoided.

Also a trust is a right in conscience to take the profits, and ensues the nature of the land; for by the 5 Ed. IV. there shall be a *possessio fratris* of an use. And by Co. Lit. *cestuy que use* may take a release as tenant at will; and trusts are looked upon by Acts of Parliament as lands; *vide* the Statute of Mortmain, Frauds,



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&c. Nay, they were looked upon as creeping up to the destruction of the common law, and therefore the Statutes of Bankrupts enable the commissioners to dispose of them. And although a trust in fee be not forfeited to the King, by way of escheat, as is held 2 Cro. 513. the reason of that is because the King has a tenant in by title: and if it were otherwise in that case, the lord would be prejudiced; but there can be in this case no prejudice to any third person, for the lands here are held of the King: in 31 Ed. I. Rot. 30 in Scacc. in the treasurer's remembrance; if a Baron purchase lands in fee jointly with his *feme*, yet they shall be liable to the King's debt, after the husband's death, if his wife survive him. And it was held in 22 Jac. in Cur. Wardor. that a power of revocation in the party is subject to the King's debt, and since we are here in a Court of conscience, it is not conscionable for Sir George Sands to keep it to himself: and less conscionable for him to withhold the fee-simple from the King. And no assent of the administrator to hold the term in trust for the felon, will debar the King of it; because it is assets to debit. *Vide* 40 Ass. 35. that the assent of an executor is not necessary, in case of a legacy given to the King. And concluded *pro quer.*

Sir Robert Atkyns argued *pro defendente*, that neither the trust of the inheritance nor of the lease was forfeited.

First, A trust is altogether the same that an use was before 27 Hen. VIII. and they have the same parents. fraud and fear; and the same nurse, a Court of conscience. By statute law and use, trust or confidence are all one and the same thing. What an use is, *vide* Pl. Com. 352. and 1 Co. Rep. in *Chudley's Case*; [\* 492] and they are collateral to the land: a *cestuy que trust* has neither *jus ad rem* nor *in re*. Now for the first point, a trust in fee simple is not forfeited, for these reasons: first, it is not an interest at common law: and therefore not forfeitable. And it was one of the chief causes why uses were invented: viz., to prevent forfeitures, as appears in Hob. Rep. *Seignior Sheffield's Case*. And in this respect, they do not differ from common or rent; which are not forfeitable; and 1 Co. Rep. *Chudleigh's Case*, they are neither chattels nor inheritance, but amphibious sorts of things, and of an unnatural generation; and the common law has no regard to them. *Vide* Dr. and Stud. 98. Lane's Rep. 104. Perk. 69, 89. No dower, nor tenancy by the curtesy of an use. An action of trespass lies against a *cestuy que use*; Pl. Com. 3 Dyer

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340. 12 Co. Rep. 2. nor forfeitable for treason. Bulst. 2 part 337. Nor do Acts of Parliament take notice of them, so as to countenance them, but to suppress them, 1 Inst. 71. and to support the rules of law; Dyer 10 Pl. Com. 58 Dyer 134. 163. they are barred by fines, run along with the land, and there shall be *possessio fratris* of them. 1 Co. Rep. 136 *b*. They were not at the common law, but were lately found out. *Vide* Hobart's Rep. 338.

First objection, uses are countenanced by the law; for Lit. *cestuy que use* shall be impanelled on a jury.

Resp. The reason of that depends upon the statute of 2 Hen. V. c. 3. A trust does not lie in tenure, and therefore is not forfeitable. 3 Inst. 21. 25 Ed. III. of treasons does not extend to uses. 3 Inst. 19. And it would be unreasonable to subject the same lands to double forfeitures; viz., by the owner of the land and by the *cestuy que trust*. *Vide* Lane's Rep. 42.

Besides, a man's interest in an use is in the nature of a right of action, which is not transferable: 10 Co. Rep. 48, 52; 3 Co. Rep. 2. 3. No remedy for it but in equity; and if the case in 10 Co. Rep. had not been settled, it would be hard to maintain it for law; and so it has been held by good opinions. And the lord of escheat is to hold the lands discharged of the trust, and by the same reason shall not have the forfeiture of it. *Vide* Mo. Rep. 196. Princip. Pasch. 8 Jac. For authorities, *vide* 3 Co. Rep. 2, 3; 2 Cro. 512, 513; 5 Ed. IV.; 7 Bro. feoffment all uses. A feoffee shall hold lands discharged of them; and the lord of a villein was not to have them till 19 Hen. VIII. c. 15. 1 Inst. 19. 33 Hen. VIII. and other acts; which gave the forfeiture of uses in particular cases, show that they were not forfeitable before.

\* Second point, the trust of a term which waits upon [\* 493] the inheritance, is not forfeitable neither, and this point has two parts: First, whether the trust of a term waiting can be forfeited? Secondly, whether this term here do so wait, as not to be forfeited, but to stick to and follow the inheritance? In this case, the term for years was originally taken in Alderman Freeman's name, and the inheritance afterwards purchased in the defendant's name. And then both are given by will to the defendant's sons; whereby George, the son, had the possession of the term by the devise, and the inheritance waits upon it. And the devise here is only a declaration that the devisees should have the lands by conveyance from the trustees, and not before; so that before

such conveyance, they have but, as it were, a right of action, and but an equitable right, and it is not properly a trust of a term, but a declaration to whom the conveyance shall be made: And therefore, the estate continues in the offender, and it is not for a court of equity to dislodge it, and make it wait upon the inheritance, although the deviser might intend it. For that is but a puisne practice, and it tends to the subversion of the rules of law, to turn a term for years into an inheritance, though neither an estate in dower, nor a tenancy by the curtesy can be had out of it. And such settlements of terms have always been discountenanced by the judges; 1 Cro. 230, Mo. Rep. 810; 1 Co. Rep. 52, and 15 Jac. I. Exchequer Chamber, held that *Lampet's* case deserved to be questioned, if it were not settled.

Second point, a trust for years is not forfeited: First, because the *cestuy que trust* had no legal interest. Secondly, he had no legal remedy to gain possession. Thirdly, the lord of escheat would hold the lands discharged of it, and therefore, in this case, the trustee for years shall have the advantage of it. And 2 Cro. 512 does not warrant the contrary, in case of a forfeiture for felony; for there was not in that case any lease from the King, but a personal contract, which is not devisable, as the interest of the term was here. And the Lord COKE, in his 3 Rep. takes a difference betwixt *choses in action* or personal, and frauds apparent; where there is a fraud apparent, there will be a forfeiture; but there is none in this case: There was no fraud in the creation of this lease; the intention of separating it was, to be a security to the inheritance. And *Armstrong's Case*, there cited, is not like to this case; for in the case of a bond, the party has a legal interest to forfeit; and fraud intended upon the statute of 3 Hen. VII. c. 4. is the ground of the [\* 494] forfeiture of the lease. \* But no such fraud appears here.

*Vide Lane's Rep.* 104. 42 Mich. 7 Jac. Lib. *Decretor in Scaccario*, 146, and *Sir Walter Raleigh's Case*, there fraud was the reason and ground of the judgment. If a lease be assigned in trust, and the inheritance be purchased, and the purchaser be attainted of treason, the King shall hold the estate discharged of the lease, because here is fraud and covin. And in *Chudleigh's Case*, 1 Co. Rep., a trust in fee simple is to many purposes regarded as a chattel; so that this, being here the trust but of a chattel, will not enforce the forfeiture. *Vide Dyer*, 143. And if the lease in

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our case wait upon the inheritance, then it is for the defendant; and it will wait upon him as well as upon the offender, if he have the inheritance. And judgments in equity ought not to contradict the rules of law, or delight to make forfeitures. Lane's Rep. 54, a trust of a term, which a husband has in right of his wife, is not forfeited for the felony of the husband; which does not contradict *Abington's Case*, for there was a fraud, and so there was in *Chirton's Case*, Dyer, and so he concluded *pro defendente*.

HALE, CHIEF BARON. There is no question concerning the forfeiture of the fee-simple in trust; for that must arise by escheat, and there can be no escheat but *pro defectu tenentis*. But here is a tenant *in esse*: If the offence committed had been treason, then there might have been a question, whether the inheritance in this case should be forfeited, in regard the rent and tenure have a continuance. But whether Sir George Sands shall hold the land discharged of the lease, or that the King shall have the term, is the sole doubt. The King does not gain an interest in a trust by forfeiture, as he does in debt; for there the interest of the bond passes to the King, and process lies to recover it in the King's own name. And it is questionable, whether the King can have this in point of prerogative in case of felony, though perhaps more might be said if the offence had been treason. It is the intention of the party that creates and governs uses and trusts: And therefore a lease shall be deemed to attend the inheritance, if it appears that the parties intended that it should do so; as here it does. And then it is no more than a shadow, an accessory to it; for otherwise, it would not be attendant of it. And then it cannot in this case go to the felon; but to the administrator of George, the son. And here they are, consolidated by the intention of the will, which directs that the trustees shall make conveyances accordingly; nor is it kept on foot, but only to avoid mesne incumbrances, which might \* affect the inheritance. And this appears to have [\* 495] been the intention of the parties, when the fee was purchased; and therefore the lease ought to go with the fee. And in the cases of leases for years in trust, that have been forfeited, fraud was the ground of it in the cases that have been cited. *Et adjournatur*.

Afterwards in Easter Term *Ann* 21 Car. II. The Barons delivered their opinions.

Baron TURNER, *pro defendente*. That here is no forfeiture neither of the inheritance, nor of the term. That the inheritance



in trust was not forfeited, he quoted 3 Co. Rep. the *Marquis of Winchester's Case*, 12 Co. Rep. 1. 2. 5 Ed. IV., 7 Cro. Jac. 513, and the statute of 33 Hen. VIII. c. 20. concerning forfeitures for treason admits it.

Secondly, That the lease was not forfeited, he argued from its being attendant upon the inheritance, and quoted Co. Plea. Cor. 19.

HALE, Chief Baron. There are two main points in the case. First, whether the inheritance be forfeited? Secondly, whether the term for years be? And I hold that neither is forfeited.

First, the trust of the inheritance is not forfeitable in this case, because if it were, the King must be in by escheat; which cannot be but for want of a tenant; and here the feoffees are tenants. And at this day a trust in fee, or in tail, is not forfeited at common law; but by the statutes of 26 Hen. VIII. c. 10. and 33 Hen. VIII. c. 20. for treason, as appears by the words of the Acts. And herewith agrees 3 Co. Rep. the *Marquis of Winchester's Case*.

Secondly, I hold that such a trust in an alien is forfeitable, and will belong to the King; as it was held in Trin. 23 Car. in *Holland's Case*, and the reason is because an alien has no capacity to purchase, for the benefit of any other, but of the King. And it would otherwise be inconvenient, that aliens should receive the profits of lands to their own use; and the mischief would be same, as if aliens purchased the lands themselves; but in that case the King is entitled to the profits only, the land itself is not forfeited to him.

Thirdly, I agree that in case of the King's debtor, lands in trust for him in fee simple are liable to the King's debt by the common law, *per cursum Scaccarii*, which makes the law in such cases; and this appears by precedents Temp. Hen. VI.: and before 4 Hen. VII. a trust or use was liable to a statute; and that is the reason

of *Chirton's Case* in 50 Ass. And it was held in *Sir Ed. [496] Cook's Case*, in Cur. Wardor, that if the \* King's debtor

have a power of revocation, that makes them liable to the King's debt: and that was the reason of *Babington's Case*, in Cur. Wardor, in 30 Car. and of *Hoad's Case*, in Pasch. 4 Jac., where lands in trust for a recusant were subjected to the debt of £20 *per annum*; so in 41 Eliz. *Babington's Case*, a trust liable to a debt imprest, because *estuy que trust* has a profit by it, but that is a special case, and grounded upon a special course in the Exchequer.

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But the forfeiture of an inheritance for felony depends upon another reason, viz., upon the want of a tenant, which does not hold in this case: And in the statute of Hen. VIII. of uses, this reason of law appears, as also in the statute of 17 Hen. VII. of a purchase by a villain in trust, because the lord has a tenant to answer him his services.

Object. If this trust be not forfeited to the King, who shall have it?

Resp. The feoffee, Sir George Sands, shall now hold the lands discharged of it, as in case of the grantee of a rent in fee simple who dies without heirs, the tenant of the land shall hold it discharged of the rent, because there is no other that has any title to it; and so he concluded that point.

The second matter is, whether the term for years be here forfeited? And I deny that it is. There is a diversity betwixt a term assigned and a term originally created; If a term be assigned in trust with fraud, it is forfeited by the outlawry of *cestuy que trust*, because it is only a chattel and so esteemed; wherewith agrees Cro. Jac. 513. and *Babington's Case* before cited; and *Sir Walter Raleigh's Case*; and such a trust shall go with the inheritance and is governed by it, as Mo. Rep. *Lord Molineux's Case*; where it was held that it should go to the heirs of a man's body; and so in some cases, a term for years shall go along with an inheritance, as if a *feme covert* has a trust for years, her husband cannot dispose of it, as he may of a term not in trust. *Vide Co. Lit. Chap. Remitter.* And in many cases trusts are ruled by other rules of equity than lands are, as in case of a trust in fee, a court of equity does not make it assets to an heir, as it does a trust for years in the hands of an executor; so that the course of equity governs them. A trust for years cannot be limited in tail with remainders over, no more than a term for years can. A trust of a term that follows the inheritance may be resembled to a box of charterts which shall go to the heir with the land that they concern, 4 Hen. VII. 10, but if the owner grant \*them over, then they shall go to the executors of the [\*497] grantee; for by the grant they become severed from the inheritance, and become chattels in gross, 8 Ed. IV. 3. So here, if the lease had been assigned over and severed, it would have been forfeited; but so long as it is attendant upon the fee, it is not forfeitable. Nor was there any conveyance or appointment in this

case to make it a lease in gross. And therefore it cannot be forfeited for these reasons.

First, because the estate in law of the term was not in the person attainted, but in the lessee; and if it were liable to be forfeited, it must be forfeited as being a chattel in him; for if not a chattel in him, it is not forfeitable by him. And this term could not by any means come to the person attainted, for he was not the person for whom it was designed, but to his brother George, and then it must go as a chattel to his executor or administrator, who is Sir George the defendant. And if it were not a chattel in George, it cannot be so in Freeman, but must attend upon the inheritance; so *quâ cinque riâ datâ* the term here is not forfeited.

Secondly, by 2d reason is grounded upon the intention of the director and deviser, that it should attend the inheritance and be conveyed over accordingly, that it might not be kept asunder. And the deviser directed that both estates should be conveyed over to Freeman and George Sands, deceased: but George had a power to dispose thereof, which he has not done. But if it had been limited to the first, second, and third sons of George in tail, then George would have had a power to dispose of it, because then it would have depended upon the freehold. But as this case was, George might by his act have disposed thereof as heir, the lease being an attendant upon the inheritance, but it would not be forfeited, *causâ quâ supra*.

Thirdly, the person attainted is not the first person to whom it was limited; but he came to it as heir, and by consequence takes it as part of the inheritance, and he has no other interest in it; as when a mortgage for years is assigned over in trust to attend upon the inheritance purchased by the mortgagee. And if it were otherwise, many inconveniencies would ensue in cases of marriage settlements, and other settlements of estates, in which it is the common course to preserve such a term and not to let it drown in the inheritance. For if the term were but forfeited in such a case, it would frustrate the whole design of the settlement. *Sir Walter Raleigh's Case* in the exchequer was to this effect: viz., Queen

Elizabeth purchased a lease for years, and gave it to [\* 498] \* Sir Walter Raleigh, and afterwards she purchased the fee, and intended to give it to Sir Walter likewise; who, to prevent a merger, assigned over the term to his son, then a child of six years of age: afterwards the Queen conveyed the fee to Sir

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Walter, who settled it upon his son; but the conveyance was void in law. Afterwards, *in primo* Jac., Sir Walter was attainted of treason, and then granted over all his goods and chattels in trust for himself; and then made a lease of his lands for 99 years, if he should so long live, in trust for himself. And it was adjudged, that the lease *supra* was forfeited, though assigned to his son, because there was fraud apparent, and himself took the profits and had surrendered and taken a new lease of the bishop of whom it was held; and that the King's inheritance was discharged of it, or at least that it should be attendant on the inheritance that was forfeited. So he concluded *pro defendente* and judgment was afterwards given, *quod defendens eat inde sine die*.

**Middleton v. Spicer.**

1 Brown's C. C. 201-205 (Reg. Lib. 1782, B. fol. 568 b).

*Crown. — Prerogative. — Bona vacantia.*

A man dies possessed of leasehold property, which he orders to be [201] sold, and the money paid to a charity, which is prevented from taking by the Statute of Mortmain. There being no next of kin, the executor is a trustee for the Crown.

This case stood in the paper for further directions in Easter Term, 1780. Daniel Goodwin, seised in fee of copyhold lands, which he had contracted to sell, and also possessed of leasehold and other personal property, made his will, and thereby devised his copyholds and leaseholds to be sold, and the money arising from the sale he bequeathed to his executors in trust, after payment of debts and legacies, to pay the residue to the Society for the Propagation of the Gospel, and gave legacies to the executors. In 1767, the testator died without issue. In 1773, three of the executors of the testator filed a bill insisting that the devise in favour of the Gospel Society was void, and claiming the residue as undisposed of. On the 11th Nov. 1774, there was a decree, that the contract for the sale of the copyhold \*should be carried [\* 202] into execution, and the money to arise therefrom be considered as part of the personal estate, and that the devise of the leasehold estate to the charity was void; it was therefore decreed to be sold, and the next of kin (none of whom were before the Court) were to go before the Master and prove their kindred. The leasehold was sold for £1560. Upon an inquiry after next of kin,



nobody claimed as such. And the question now was, whether upon this void devise the executors were beneficially entitled, or the Crown, the Attorney-General being made a party to the bill and claiming in that behalf.

Mr. Kenyon (for the executors). — The question is, how this money is to go. The surviving executors claim, and unless Mr. Attorney can make out a better title on the part of the Crown, they must prevail. It is not, of course, that whatever has no owner belongs to the King. There is no decision, in any similar case to the present, in favour of the Crown. *Attorney-General v. Sandys*, 3 Ch. R. 19; *Burgess v. Wheate*,<sup>1</sup> 1 Blackst. Rep 123 are both decided against the claim of the Crown.

Mr. Attorney-General, *contrâ*. — Why is the Attorney-General always made a party to bills in cases where there is no heir? On the part of the Crown, I claim the undisposed part, amounting to about a thousand pounds. The executors here are entitled only as trustees; a legacy is left them for their trouble. They are not intended to take beneficially. There is not much doubt that the Crown is entitled by prerogative. The King is owner of everything which has no other owner. It is so in the case of a legal intestacy, where there is no will. The grantee of the Crown is entitled to administration to a bastard. Here, there is a will and an executor, to whom the ecclesiastical court has granted probate. The executor is owner only of a special property to collect for the next of kin. The case of the *Attorney-General v. Sandys* is very peculiar: it is of a forfeiture for felony, and one of the harshest and most odious forfeitures. In *Burgess v. Wheate*, an estate was vested in Sir Francis Page in trust for several persons; the last died without an heir; Burgess was heir *ex parte maternâ*, the estate coming *ex parte paternâ*; Lord MANSEFIELD held, that the trust ought to follow the rules of a legal estate. The opinions of Lord NORTHINGTON and Sir THOMAS CLARKE went upon two points: 1st.

That the only case where the lord, or the King, was entitled [\* 203] was the defect of a tenant: \* where there was a feoffee there was a tenant, whether he were beneficially entitled or not; so that the principle of escheat failed. The argument was pressed by Lord Camden, then Attorney, that, if the

<sup>1</sup> The profession will find a very valuable report of *Burgess v. Wheate*, from Lord NORTHINGTON's own notes and other

MS. sources, in 1 Eden's Ca. Ch., from p. 177 to p. 261.

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land escheated *propter defectum tenentis*, it would escheat when the line of the trustee failed; for the lord cannot lose his escheat, he therefore must have it on the failure of the line of the trustee, or of the *cestui que trust*; to construe this otherwise, would be to give a trustee, created by the Court of Equity, one of the mischiefs of uses, depriving the lord of his escheat. This argument received no answer, though the Court would not admit his conclusion from it. Admitting this argument would not bear as to the present case; the second ground in that case, was a notion that the Court of Equity would not grant a *subpena* against the feoffee, for any who was not in privity with the feoffee; and, therefore, that the Crown, not claiming in any privity, could not have a *subpena*. That argument begs the question that this Court will consider the trustee as having something substantial, which cannot be taken from him but by the feoffee, or somebody claiming in privity with him; whereas the Court considers the trustee only as an instrument. Against this argument stands the course of the Court in making the Attorney-General a party, wherever there is no heir or representative. The right to personal property is nominally in the executor, but it is only to collect the property, and attended with circumstances which show that it is for special purposes only. The position in *Salkeld*, 37, that the ordinary is not bound to grant administration to the grantee of the Crown, but that it is done through respect, and that the property was, at law, in the ordinary, and the administration taken out only in certain cases, is founded upon a loose inquiry into the common law. The ordinary never had any interest in the property. He had jurisdiction in matters testamentary, but was always bound to account with somebody, 2 Inst. 398. He had such an interest as an administrator *durante minori etate*, merely an authority not at all resembling property. We are told the writ *de rationabili parte* was founded in the common law, to give the wife and children their shares, unaffected by the will. In Wilkins's Anglo-Saxon Laws and the Laws of the Conqueror, the rights are clearly defined. Nath. Bacon, 89.<sup>1</sup> By Glanv. L. 7. c. 6, 7, 8, only the validity of the will was contestable \* in the Court Chris- [\*204] tian. In the latter part of Hen. III. the right was perfectly fixed in the ecclesiastical court, as appears by the Magna

<sup>1</sup> See the 36th law of the Conqueror, in Mr. Kelham's edition at the end of his Norman Dictionary, p. 58.

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Charta of John and Hen. III. History tells us, that about the latter end of John's reign, the church obtained fuller authority than before, over wills. In the M. C. of John, c. 27, the administrator was to be *per visum ecclesie*,—the church were only supervisors; this was omitted in Henry's charter. The cases are so inaccurate as to take the statute of Westminster, as to payment of debts, as giving a right to the church; but the statute was only declaratory of the common law, which charged the residue with the debts, and the statute enforced the payment of them. The subsequent statutes only regulate the mode of distribution. No doubt the grantee of the Crown would be entitled to a *mandamus*, to compel the grant of administration. In *Hobson v. Wells*, Aleyn, 53, it is determined the Crown may grant administration.

Mr. Kenyon (in reply): Mr. Attorney's speech proves that the delay which has been in this case has enabled him to collect every argument the case affords. Still the reasoning does not affect the present case. This is not an intestacy: I could add a case from Peere Williams,<sup>1</sup> to show that in an intestacy the Crown has a right; but, in this case, the Crown has no legal right. The argument from the statute of uses does not apply to *Burgess v. Wheate*. The ground I go upon is, that the party for whom I am has a legal right. I thought I had a right to call upon them to show their equity, on the ground that *potior est conditio possidentis*. The executor has a right by occupancy, and the King has no stronger title. As to the Attorney-General being a party to bills; there are many cases in which unnecessary parties are made. From Stamford to Comyns, there is not a saying that there is any such right as this in the Crown.

LORD CHANCELLOR (THURLOW): I do not see how this case is distinguishable in principle from *Burgess v. Wheate*. The devise vests the legal property in the executor. If there is no executor, the Crown may grant letters patent to take out administration. The question results, whether the executor, being appointed only as a trustee, can claim as highly as an occupant at common law.

<sup>1</sup> Alluding probably to the case of *Jones v. Goodchild*, 3 P. Wms. 32, where the following curious *quære* is subjoined of the Reporter: A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate:—what shall become of the lease? shall it

go to the administrators of the bastard, or to the Crown, or does the limitation to the heir make any difference, or is it *casus omnisus* out of the Statute of Frauds? and so remains liable to occupancy at common law, or lastly, is the lessor entitled, the lease being determined?

No. 2. — *Middleton v. Spicer*, 1 Brown's C. C. 204, 205.

Where there is a trustee, the general rule of the Court is that he can have no other title. Mr. Kenyon contends, — that the executor, being clothed with a legal title, has a right to hold the property. *Burgess v. Wheate* was determined upon divided \* opinions, and opinions which continue to be divided, [\* 205] of very learned men.<sup>1</sup> The argument of the defect of a tenant seems to be a scanty one. Whether that case is such an one as binds only when it occurs *speciatim*, or affords a general principle, is a nice question. Thus much is decided, that in the case of a trustee who has merely an office, the Court has been of opinion that the same claim which would have been competent if it had been at common law, is not competent for such a trustee.<sup>2</sup> Here, the executor has a common-law right. — The Crown would have had a right had there been no executor. — This case I think is obnoxious to every principle that can be drawn from *Burgess v. Wheate*. The legal estate in the trustee must remain in him, unless there is a claim against him which affects his conscience. If, beyond the general title, there must be a privity with the testator, the Crown has no such privity. If the trustee ought to hold it for every person who would have been entitled if it were at law, then he should hold it for the Crown, as well as any other person.

The cause stood over and now came before the Court for judgment. The Reporter was absent, but has been favoured with the following note:—

LORD CHANCELLOR (THURLOW): It would be mere pedantry to run over all the cases to be met with on this subject, which are collected, and fully stated in *Burgess v. Wheate*, 1 Black. 123: 1 Eden's Ca. Ch. 177. This is not a case in which the assets can be marshalled, which is never done unless to make a debt of an inferior nature payable. Lord MANSFIELD did not assent to the argument of the MASTER OF THE ROLLS, in *Burgess v. Wheate*<sup>3</sup> respecting an escheat, but no such question arises in the present case. Here the executors, having legacies bequeathed, and being clearly trustees, cannot *by any possibility* take any beneficial interest. In *Burgess v. Wheate*, and every other case that is to be met

<sup>1</sup> See the report of it in 1 Eden's Ca. Ch. 177 to 261, and the notes especially, p. 259, *ibid.* See also *Walker v. Denne*, 2 Ves Jr. 170, 277, 2 R. R. 185.

<sup>2</sup> See *Williams v. Lord Lonsdale*, 3 Ves.

Jr. 752, 4 R. R. 149; *The King v. Coggin*, 6 East. 431, 8 R. R. 509; Scriven on Copyholds, 293, 294; and the note on *Fawcett v. Lowther*, Supp. to Ves. Sen. 348, 349.

<sup>3</sup> See the note in 1 Eden's Ca. Ch. 259.



with, the Attorney-General has been a party, which shows it was always the opinion that the Crown had such an interest in cases of this kind, that it was necessary to make him a party. The executors being excluded, and no relations to be found, I consider the executors as much trustees for the Crown, as they would have been for any of the next of kin, if these could have been discovered.

Therefore decreed in favour of the Crown, but directed all the executor's expenses to be paid.<sup>1</sup>

#### ENGLISH NOTES.

Prior to the Forfeiture Act 1870 (33 & 34 Vict. c. 23), the Crown was entitled to lands forfeited for certain crimes. It is now provided by section 1 of the Act just mentioned, "From and after the passing of this Act (*i. e.* 4th of July, 1870), no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry." The remainder of the Act is concerned with the personal disabilities of the convict, and makes provision for the administration of his estate. The Act abolishing forfeiture and escheat in the cases mentioned is not retrospective in its operation. *Sharp v. De St. Sanceur* (1871), L. R., 7 Ch. 343, 41 L. J. Ch. 576, 26 L. T. 142, 20 W. R. 269. The subject is now, however, of diminishing importance.

Outlawry in civil proceedings is abolished by 42 & 43 Vict. c. 59, s. 3.

The provisions of the Naturalization Act 1870 (33 Vict. c. 14) and the amending statutes have also divested the right of the Crown to treat as escheated the lands of an alien. See *Calvin's Case*, 2 R. C. 575 *et seq.*

The right of escheat for want of a tenant is the outcome of the feudal system, and is based upon the failure to perform the services which were the condition upon which the land was granted. Where, therefore, lands are not held immediately of the Crown, the lands escheat to the mesne lord, but this tenure must have commenced prior to the statute *Quia Emptores* (18 Ed. I. st. 1, c. 1). *Bradshaw v. Lawson*

<sup>1</sup> The Court (*inter alia*) ordered, "That in taxing the costs of the defendants the executors, the Master should tax and settle the expenses they had been out of pocket on account of their trust and executorship; and they were to be at liberty to claim any allowance that had not been already made to them."

As to the residue, the declaration was, that "the same was a resulting trust in the executors for the benefit of the Crown." And it was ordered to remain in the bank in the name of the Accountant-General, &c., subject to the disposition of his Majesty and the further order of the Court. REG. LIB.

Nos. 1, 2. — Att.-Gen. v. Sir Geo. Sands; Middleton v. Spicer. — Notes.

(1791), 4 T. R. 443, 2 R. R. 429. Where it cannot be ascertained of whom the lands are held mediately in right of a seignior, the Crown is, as chief lord, entitled by escheat. *May v. Street* (1588), Moo. 257, 4 Leon. 207, Cro. Eliz. 120. These lands, however, cannot be granted by the Crown before office found. *Doe d. Hayne v. Redfern* (1810), 12 East, 96, 11 R. R. 329.

It is upon a similar principle that copyholds not holden of a crown manor escheat to the lord of the manor. *Walker v. Denne* (1793), 2 Ves. Jr. 170, 2 R. R. 185. The same principle was applicable in the case of forfeitures *propter delictum tenentis*. *Duke of York v. Marsham* (1667), Hard. 432.

Escheat was only applicable to that which could be the subject of tenure. Thus, prior to the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, a writ of escheat did not lie for a rent charge, or a rent reserved; Bro. Ab. tit. Escheat, pl. 7, 9, 22. But both rent charges and rents might be forfeited. *Ibid.* pl. 9 & 22. A remainder or reversion may escheat. Bro. Ab. tit. Prerogative, pl. 25, Dyer 137, pl. 26.

The law of escheat was strictly applicable to the legal as opposed to the equitable estate. Accordingly where a sole or surviving trustee or mortgagee of a freehold estate of inheritance died intestate and without an heir, the lands escheated. This rule has, however, been remedied by statute. The provisions now in force are contained in the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 29, & 32. These sections enable the Chancery Division of the High Court to make an order vesting the property in the persons named in these sections. It will be observed that these enactments speak of the personal representative of a trustee or mortgagee; this is necessary by reason of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30, which enacts that trust and mortgage estates shall vest in the personal representatives and not the heir, notwithstanding any devise of the same. The Trustee Act, 1893, does not, neither does the Conveyancing Act, 1881, in terms apply to the Crown, and it seems therefore questionable whether the practice of omitting a devise of trust and mortgage estates should be followed in the will of a person who is likely to be without an heir. See *Rex v. Davies*, No. 6, p. 201, *post*.

Where the Crown is beneficially interested in part as well as entitled by escheat to the whole legal estate, the Court will not make a vesting order against the Crown, but an application must be made for an order for sale under the provisions of the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71). *Re Pratt's Trusts* (1886), 55 L. T. 313, 34 W. R. 757.

Where lands were vested in trustees or mortgagees, and the beneficiary or mortgagor died intestate and without heirs, there was no

escheat, because the lord had a tenant to do his services; *Burgess v. Wheate* (1759), 1 Eden, 177, 1 Wm. Bl. 121, 184, *Darall v. New River Company* (1849), 3 De G. & Sm. 394, 18 L. J. Ch. 299; although, where the mortgage was created by a term of years the lord took by escheat and was entitled to redeem. *Viscount Downe v. Morris* (1844), 3 Hare, 394, 13 L. J. (N. S.) Ch. 337. The law is now altered by the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71) s. 4, which enacts: "From and after the passing of this Act (*i. e.*, 14th of Aug. 1884), where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporal hereditaments." The words "whether devised or not devised to trustees" are intended to apply to such a case as *Ouslow v. Wallis* (1849), 1 McN. & G. 506, 19 L. J. Ch. 27.

An estate *par autre vie* given to trustees in trust for another and his heirs, now passes to the administrator of the beneficiary, and does not belong to the trustees. Wills Act, 1837 (1 Vict. c. 26), s. 6.

The property is subject to the burdens created by the person on whose death it escheats, and also to the same incidents of tenure as it would have been subjected to in the hands of an heir, such as dower, curtesy, freebench, or a lease. *Turner v. Hodges* (1629), Hut. 102. Accordingly, after the passing of 3 & 4 Will. IV. c. 104, which subjects lands descended to the payment of debts, the lord claiming by escheat takes subject to that obligation. *Evans v. Brown* (1842), 5 Beav. 114, 11 L. J. Ch. 349. The lord taking by escheat may redeem a mortgage created by a term of years by the owner. *Viscount Downe v. Morris* (1844), 3 Hare, 394, 13 L. J. Ch. 337. The cases of *Evans v. Brown* and *Viscount Downe v. Morris*, also discuss the question whether the liability to debts of lands escheated takes effect in priority to, or *pari passu* with, lands specifically bequeathed; but are not conclusive on the point.

The title by escheat, even in the case of the Crown, is defeated by a disposition by will. *Darall v. New River Company* (1849), 3 De G. & Sm. 394, 18 L. J. Ch. 299.

The lord taking by escheat is entitled to distrain, but cannot re-enter for condition broken; 1 Inst. 215 *b*; and, prior to the Satisfied Terms Act, 1845 (8 & 9 Vict. c. 112), was entitled to the benefit of an attendant term. *Thruston v. Attorney-General* (1685), 1 Vern. 340. So too the lord could recover the title deeds of lands escheated. Bro. Ab. tit. Charters, 39. The equitable doctrine of conversion is only applicable

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to the law of escheat, where the character of land or money is definitely fixed. *Walker v. Denne* (1793), 1 Ves. Jr. 170, 2 R. R. 185, *Sharp v. De St. Satureur* (L. C. 1871), L. R., 7 Ch. 343, 41 L. J. Ch. 576, 26 L. T. 142, 20 W. R. 269.

The procedure in cases of escheat to the Crown is now regulated by the Escheat Procedure Act, 1887 (50 & 51 Vict. c. 53).

Where the executor is not intended to take the residue beneficially, and the residuary gift fails, and there are no next of kin, he may nevertheless collect the estate. *Jones v. Goodchild* (1729), 3 P. Wms. 33. He would, however, be a trustee for the Crown: *Re Wilcock's Settlement* (1875), 45 L. J. Ch. 163, 33 L. T. 719, 24 W. R. 290.

A curious point arose in *Colchester v. Law* (1873). L. R., 16 Eq. 253, 43 L. J. Ch. 60. Lord ELLENBOROUGH had received the suitors' funds as Chief Clerk to the Court of King's Bench, and afterwards of the Queen's Bench, during his tenure of office. The moneys he invested, and received the interest for his own benefit. After the report of a committee of the House of Commons, Lord ELLENBOROUGH, in deference to that report, left the accumulations of interest standing to a separate account at his bankers. In a suit to administer his estate the Crown was held entitled to the accumulated fund, on the ground that the testator had shown an intention to treat it as *bona vacantia*.

Administration is taken out by the Crown, under the provisions of the Treasury Solicitor's Act, 1876, 39 & 40 Vict. c. 18.

The Treasury Solicitor is liable to pay the debts of the intestate. *Megit v. Johnson* (1780), 2 Doug. 542.

The right of the Crown to treasure trove depends upon the same principles as the right to the goods of an intestate. *Woodward v. Fox* (1691), 2 Vent. 267.

In the Duchy of Lancaster, which is now an appanage of the Crown, and in the Duchy of Cornwall, the prerogative rights of the Crown are vested in the Dukes. *Dyer*, 94, 232, *Dyke v. Walford* (P. C. 1848) 5 Moo. P. C. 434, 12 Jur. 839; *In the goods of Canning* (1880) 5 P. D. 114, 41 L. T. 737; 28 W. R. 278.

#### AMERICAN NOTES.

In America escheats for defect of heirs belong universally to the State or some corporation thereof as the ultimate proprietor. Kent's Com. \*424; Cooley's Blackstone's Com., \*302, n.; *People v. Folsom*, 5 California. 373; *Hughes v. State*, 41 Texas, 10.

Under the modern statutory rule movables escheat. *State v. Reeder*, 5 Nebraska, 203.

In some States, as for example, Nebraska, Indiana, and Tennessee, escheated property goes into the common-school fund. In North Carolina it



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goes to the State University. In Illinois to the county of which the decedent was a resident. See list of statutory provisions, 3 Washburn on Real Property, p. 53, note 2.

It is probably the general rule that the State takes only the interest of the decedent, after payment of all debts and incumbrances. 3 Washburn on Real Property, p. 55; *Watson v. Lyle's Admr.*, 4 Leigh (Virginia), 236; *Casey's Lessee v. Indors.*, 1 Gill (Maryland), 430; 39 Am. Dec. 658; *Farmers', &c. Co. v. People*, 1 Sandford Chancery (New York), 139; *Croner v. Cowdrey*, 139 New York, 471; 35 Am. St. Rep. 716. See *Brown v. State*, 36 Texas, 282, looking to the contrary. So an interest in remainder cannot be escheated until the expiration of the life estates. *Commonwealth v. Naile*, 88 Pennsylvania State, 429. But a vested remainder in fee, dependent on an estate for life, may escheat before the death of the tenant for life. *People v. Conklin*, 2 Hill (New York), 67. See *Heuey v. Brooklyn B. Society*, 39 New York, 333.

All rights of property, of whatever nature, revert to the People when the owner dies intestate and there is a failure of heirs to take such property. In respect to the rights so acquired by the State there is no essential difference between real and personal property, although the doctrine of escheat applies only to legal estates, and does not, in a strict sense, affect either equitable estates or personal property. In a case where a widow had the right to surplus moneys on a foreclosure sale, by virtue of an ante-nuptial settlement, and she died intestate and without heirs, it was held that her interest reverted to the State. *Johnston v. Spicer*, 107 New York, 185.

By Statute, in some States, the rule that on the death of the *cestui que trust*, without heirs, the title remains in the trustee for his own benefit, is abrogated. *Matthews v. Ward*, 10 Gill & Johnson (Maryland), 443; *Wood v. Mather*, 38 Barbour (New York), 473; *Commonwealth v. Naile*, 88 Pennsylvania State, 429.

On the dissolution of a corporation, its lands revert to the grantor and its personality escheats to the State, in the absence of different statutory regulation. *For v. Horah*, 1 Iredell Equity (North Carolina), 358; 36 Am. Dec. 48; *Coulter v. Robertson*, 24 Mississippi, 278; 57 Am. Dec. 168.

In some States proceedings are necessary to vest the title in the State. *People v. Folsom*, 5 California, 373; *Wilbur v. Tobey*, 16 Pickering (Mass.), 177; *Bradstreet v. Supervisors*, 13 Wendell (New York), 546; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch (United States Supr. Ct.), 603; *Commonwealth v. Hite*, 6 Leigh (Virginia), 588; 29 Am. Dec. 226; *Wallahan v. Ingersoll*, 117 Illinois, 123.

But in other of the States, title vests at once upon the death of the tenant without such proceedings. *Stevenson v. Dunlap's Heirs*, 7 T. B. Monroe (Kentucky), 131; *Farrar v. Dean*, 24 Missouri, 16; *State v. Reeder*, 5 Nebraska, 203; *Crane v. Reeder*, 21 Michigan, 24; 4 Am. Rep. 430; *Montgomery v. Dorion*, 7 New Hampshire, 475; *Colgan v. McKeon*, 24 New Jersey Law, 565; *Rubeck v. Gardner*, 7 Watts (Pennsylvania), 455; *Puckett v. State*, 1 Sneed (Tennessee), 355; *Haigh v. Haigh*, 9 Rhode Island, 26; *Sands v. Lynham*, 27 Grattan (Virginia), 348; 21 Am. Rep. 291 (case of alienage); *Holliman v. Peebles*, 1 Texas, 673; *Den v. O'Hanton*, 21 New Jersey Law, 582.

## No. 3. — Baskerville's Case, 7 Co. Rep. 28 a. — Rule.

The somewhat analogous and very interesting question of the rights of one civilly dead, by reason of sentence to imprisonment for life for felony, was examined in *Acery v. Everett*, 110 New York, 317; 6 Am. St. Rep. 368. A person under such sentence is by the statute of that State "deemed civilly dead." The Court held at common law an attainted person was not divested of his land (except for treason) until office found; he could devise it subject to the right of entry by the Crown for the forfeiture, and as to either grantor or grantee the grant would be valid as against all persons except the King; and that the New York statutes impose no greater penalty than the common law, do not divest the estate of the criminal, and if land devised to him was on his dying without issue to vest in another, it would not so vest on his civil death. See a learned note, 6 Am. St. Rep. 379. This decision has been followed in *Davis v. Loring*, 85 Texas, 39.

## No 3. — BASKERVILLE'S CASE.

(C. P. 1585.)

No. 4. — ROE D. JOHNSON *v.* IRELAND.

(K. B. 1809.)

## RULE.

IN general, lapse of time cannot be pleaded in bar of the claim of the Crown, in respect of a certain and permanent interest, nor can laches be imputed to the Crown. A grant from the Crown may however be presumed after a long continued possession by a subject without interference on the part of the Crown.

**Baskerville's Case.**

[7 Co. Rep. 28 a.]

*Crown. — Nullum Tempus occurrit Regi.*

Title to present by lapse devolved on the Queen. The patron presented one A., who was admitted, instituted, and inducted, and died; held the Queen has lost her title to present by lapse.

The stat. *Prærogativa Regis, quod nullum tempus occurrit Regi* is to be intended when the King hath an estate or interest certain and permanent, and not when his interest is specially limited when and how he shall take it.

In a *Quare impedit* in the Common Pleas, the case was, that 1 Mar. title to present by lapse was devolved to the Queen to the

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 No. 3. — Baskerville's Case, 7 Co. Rep. 28 a.
 

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church of Cusep in the county of Hereford. Sir Nicholas Arnold the patron presented one Evans, who was thereto admitted, instituted, and inducted, and died; and if the Queen had lost her title to present by lapse, or not, was the question; and it was adjudged that the Queen had lost it. For the Queen had but *unam et unicam presentationem hac vice*; which cannot be extended to the second avoidance; for negligence to present shall lose the subject one presentment only by lapse and not divers; and if the Queen has *primam et proximam presentationem* granted to her, she cannot take the second. And otherwise great inconvenience would ensue to the patron; for the Queen might forbear to present, and suffer divers to present by usurpation one after the other, and take her turn when she would, and the patron might be in a manner thereby disinherited. And the stat. of *Prærogativa Regis, quod nullum tempus occurrit Regi*, is to be intended when the King hath an estate or interest certain and permanent, and not when his interest is specially limited, when and how he shall take it, and not otherwise; for there time is the substance of his title, and in such case *tempus occurrit Regi*. And so was it at another time adjudged, Pasch. 28 El. Rot. 412 in the Common Pleas, between *Beverley* plaintiff, and the *Archbishop of Canterbury and Gabriel Cornwall*, defendants, for the church of Somerby in the county of Lincoln.

To the case in Fraser's edition, is appended the following note of Mr. Hargrave:—

But the rule of *nullum tempus occurrit Regi* is subject to various exceptions both at common law, and by statute. — 1. There are many cases in which the subject may make title against the King by prescription, as to treasure trove, waifs, estrays, and such other things as may be seized without matter of record. Co. Lit. fol. 114 a. and b. 2. In some cases the King's right necessarily fails for want of exertion in due time, either because the subject of his right determines before he claims it, or because it is specially limited in point of time by its creation. An instance of this is, where the land of tenant for life is found to be forfeited, and he dies before seizure by the King; for it is then too late to seize for the King: who, as Staundford expresses it, hath surceased his time, the estate forfeited being determined, and the right of entry being in him in reversion. Staundf. Prærog. 32. b. The law is the same where the King is entitled to the next presentation; in which case if another

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No. 3. — *Baskerville's Case*, 7 Co. Rep. 28 a.

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presents, and the incumbent dies, the King cannot have the second or any subsequent presentation. This was the opinion of Brown, Justice against Weston in *Willion* and *Berkely*, Plowd. 243, 249, and was so adjudged in *Baskerville's Case*, 7 Co. Rep. 28 a. Lord Chancellor EGERTON finds fault with the doctrine of this last case; but his objections do not appear in the least satisfactory. See his Observations on Lord COKE's Reports, 8, 3. Sometimes lapse of time drives the King to a suit. Thus by the statute of the 13th of Richard the Second, and according to Lord COKE by the common law, if the King presents to a benefice already full with an incumbent, the King's presentee shall not be received by the ordinary, till the King has recovered his presentment by due process of law, 13 R. II. stat. 1, c. 1.; Staundf. Prerog. 32 b; 2 Inst. 358; 7 Co. Rep. 344 b. See also Cro. Jac. 385; 4 H. IV. c. 22; Gids. Cod. 1st ed. 802. 4. There are several statutes which wholly extinguish the King's title, if not exerted within a limited number of years. By a statute of the 14th of Edward the Third, the King lost his presentment, where he was entitled by having in his hands the temporalities of a bishopric, or the lands of a person within age, unless he presented within three years after the voidance. But this statute was soon repealed. See 14 E. III. st. 3, c. 2; 25 E. III. st. 3, c. 2; 2 Gids. Cod. 1st ed. 800. The chief statutes for limiting the King's title to a certain time now in force are the 21st Jac. I. c. 2 and the 9 Geo. III. c. 16. By the former the King is disabled from claiming any manors, lands, or hereditaments, except liberties and franchises under a title accrued sixty years before the beginning of the then session of Parliament, unless within that time there has been a possession under such title. But the efflux of time rendering this provision continually more ineffectual, the latter statute introduces one of a permanent kind by limiting the King to sixty years before the commencement of the suit, or proceedings for recovery of the estate claimed. See further a Commentary on the 21st Jac. in 3 Inst. 188. See also something relative to the rule of *nullum tempus occurrit Regi* in Hob. 152, 154, 347.



**Roe d. Johnson v. Ireland.**

11 East, 280-284 (s. c. 10 R. R. 504).

*Crown. — Lapse of Time. — Presumption of Lost Grant.*

[280] The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the Crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent, but in 1649 the parliamentary survey charged the churchwardens with 6*d.* rent under the head of "*freehold* rents," and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: *held* that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804, and though a tablet of parochial benefactions, at least as old as 1656, suspended in the parish church, mentioned the gift of the copyhold by surrender, but contained no notice of any enfranchisement of it.

In ejectment for certain copyhold lands, in which a verdict had been found for the plaintiff before HEATH, J., at Chelmsford assizes, upon a rule *nisi* for a new trial, the only question was, Whether the learned judge ought to have left it to the jury, under all the circumstances, to presume an enfranchisement by the Crown? in which case the verdict ought to have been for the defendant. It appeared upon the report, and was now agreed, that the lands in question, which lay within the manor of Westham, were once copyhold, and continued so at least down to the 30th of April, 1636, in the 12 Car. I., when one J. Newman, who had been admitted tenant in the 5 Jac. I., on the surrender of certain persons to him and his heirs, surrendered the premises in question, consisting of two cottages with gardens, &c., to the use of B. Collier and another, churchwardens of the parish of Westham, and to their successors. These entries were read from the Court rolls, and no mention was made of the rent in either of those entries: but it appeared that 6*s.* 6*d.* was the old copyhold rent. And it was admitted that no tenant appeared on the rolls, at any time subsequent to Newman's surrender, but that the annual rent of 6*d.* had been constantly paid by the holders of these tenements since that time. There was also given in evidence the copy of [281] a tablet of parochial benefactions suspended \*in the church, dated 30th April, 1656 (the old letters of which were still visible, though it had been then recently painted), viz.,

No. 4. — *Roe d. Johnson v. Ireland*, 11 East, 281, 282.

“ John Newman surrendered unto the churchwardens 2 messuages and 2 gardens, situate in the churchyard.” There were also proved two leases from the Crown of the manor of Westham, the one of the 10th January, 14 Jac. I. 1616, granted by the King to Sir Francis Bacon and others for 99 years absolute from Mich. then last past, to the use of Prince Charles and Henrietta Maria his consort and Queen Catharine. The other, of the 15th June, 1694, to Sir George Booth, for 99 years absolute from the death of Queen Catharine, which was to be concurrent with a former lease. The last lease expired in December, 1804. A conveyance from the Crown to the lessors of the plaintiff under the land-tax Act was admitted. And in 1806 and 1807 several proclamations were made in the manor Court calling on the tenants to come in and be admitted; and none appearing, proceedings were had thereupon, according to the custom of the manor, the result of which was, that the premises were declared to be forfeited to the lord. For the defendant it was insisted that the jury ought to presume that these, which were formerly copyhold premises, had been enfranchised by the Crown; and in support of such presumption the following evidence was given. First, The parliamentary survey in 1649, under the title of the manor of Westham. There were 3 columns of rents; one of freehold, another of copyhold, the 3rd of rents not ascertained; and in the column of freehold rents the churchwardens were marked 6*d.* rent. Receipts given by the steward of the manor from 1803 to 1805 were for quit rents. The style of these receipts was endeavoured to be accounted for by the steward, by saying that the discovery \* of the premises being copyhold [\* 282] was made subsequent to those receipts, by finding the ancient Court rolls of the manor, from which the entries first mentioned were read, in the evidence-room of Lord Henniker, the late lessee of the Crown; the rentals at first given to the witness being without distinction of freehold or copyhold. And it was suggested that the compilers of the parliamentary survey might probably have been led into the same mistake if they could not get the Court rolls; and that so the mistake might have been continued down; and was the less likely to be discovered, because it did not occasion any diminution of the revenue of the Crown. Upon this evidence the learned Judge told the jury, that, considering all the circumstances, he saw no ground for their presuming an enfranchisement, inasmuch as it would be subversive of the maxim of the law,

*nullum tempus occurrit Regi*. This direction was objected to upon a motion for a new trial made in the last term, when the case of the *Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102, was referred to, where a grant or charter was presumed against the Crown upon a possession of 350 years.

Garrow, Marryat, and Walford, in showing cause against the rule, relied principally on the ancient Court rolls recently discovered, the existence of which was probably not known to the parliamentary commissioners; and if not, it would account for the mistake they had made in classing the 6*d.* rent under the head of freehold rents. The present steward had fallen into the same mistake as his predecessors before the discovery of the Court rolls.

Then the presumption of a grant of enfranchisement [\* 283] \* was rebutted by the silence of the Court rolls and of the parochial church tablet in respect to any such enfranchisement; though the latter noticed the benefaction of these premises as copyhold, by the surrender to the churchwardens. Next, they urged, that during all the time within which a grant from the Crown could be presumed to have been made, if at all, which was between 1636, when Newman surrendered the copyhold to the churchwardens, and 1649, the date of the parliamentary survey, the premises were out on lease, and could not have been enfranchised without the concurrence of the lessees. And, lastly, they asked to whom the grant of enfranchisement was to be presumed to have been made? Not to Newman, after his surrender of the copyhold to the churchwardens and their successors: and these latter could not take a grant of land to them and their successors.<sup>1</sup> [It was suggested that the grant might have been to the two first churchwardens and their heirs in trust for their successors, who had continued ever since in possession.] The possession of the churchwardens was equally accounted for, whether the premises continued copyhold or were enfranchised.

The Attorney-General, Shepherd, Serjt., and Pooley, *contra*, were stopped by the Court.

LORD ELLENBOROUGH, C. J. The copyhold rent having been 6*s.* 6*d.*, and no evidence that any other rent than 6*d.* had ever been paid for the premises in question, which are described to be

<sup>1</sup> See 3 Bac. Abr. 377, tit. *Grants*, in *notingius*, and 1 Bac. Abr. 601, tit. *Churchwardens*. And see also what is said by LORD KENYON in *Withnell v. Gartham*, 6 T. R. 396, 3 R. R. 218, 219.

Nos. 3, 4. — Baskerville's Case; Roe d. Johnson v. Ireland. — Notes.

[\*284] freehold in the parliamentary \* survey, it is impossible to say that this was not evidence to go to the jury that they were freehold: but their consideration of the question was excluded by the learned Judge, who told them that they could not in this case presume a grant against the Crown. The parliamentary survey stands very high in estimation for accuracy: it has happened to me to know several instances in which the extreme and minute accuracy of the commissioners who drew it up has exceeded any thing which could have been expected. And when I find from thence that a freehold payment of 6*d.* was made for the premises in 1649, and there is no evidence of any other payment since that time; and when I find that there were persons existing between 1637 and 1649 (for the King continued in the exercise of his regal functions during the greater part of that time) competent to make an enfranchisement; I would presume anything capable of being presumed in order to support an enjoyment for so long a period. As Lord KENYON once said on a similar occasion, that he would not only presume one, but one hundred grants, if necessary, to support such a long enjoyment. It is clear, therefore, that there ought to be another investigation of the case. And his Lordship, after consulting with the rest of the Court, added that the costs should abide the event.

PER CURIAM,

*Rule absolute.*

#### ENGLISH NOTES.

The maxim has been modified by statutes. The provisions now in force are the Act, commonly referred to as the "Nullum Tempus Act," 9 Geo. III. c. 16, which has been amended by the Crown Suits Act, 1861 (24 & 25 Vict. c. 62). By these Acts the Crown is precluded from bringing an action more than sixty years after the right has accrued. There is excepted, however, from the operation of the statute the right of the Crown in respect of reversionary interests.

The Duchy of Cornwall is placed on a similar footing by 7 & 8 Vict. c. 105, 23 & 24 Vict. c. 53, and 24 & 25 Vict. c. 62.

In actions respecting the estates of deceased persons, whether on the part of the Crown to recover the same on the principles of *Middleton v. Spicer*, No. 2, p. 161, *ante*, or upon petition of right by the next of kin to recover from the Crown personal property seized as *bona vacantia*; the statutes of limitation apply to the same extent as in actions between party and party: Intestates' Estates Act, 1884 (40 & 41 Vict. c. 71), ss. 2 & 3.



In the case of death duties there is also a limitation of time within which the claim of the Crown must be asserted; 52 & 53 Vict. c. 7, ss. 12 & 14; 57 & 58 Vict. c. 30, s. 8 (2).

The statute 9 Geo. III. c. 16. does not bar the right, but only the remedy of the Crown, and accordingly does not confer a title on the disseisor; *Goodtitle d. Parker v. Baldwin* (1809), 11 East, 488, 11 R. R. 249; and it would seem that the 24 & 25 Vict. c. 62. has a similar operation.

The maxim *nullum tempus occurrit Regi* was invoked in the House of Lords in the *Wensleydale Peerage Case* (H. L. 1856), 5 H. L. Cas. 908, 2 Macq. H. L. 479. Baron PARKE had been created a life peer under the title of Baron Wensleydale. It was objected by the majority that the Crown had not exercised this right for 400 years, and the House of Lords, while admitting the right of the Crown to confer upon any person the rank or dignity of a peer, held that the person so advanced could not sit and vote as a member of the House. This contention falls within the exception, as the right was not claimed by the Crown in respect of a certain and permanent interest. The Crown is now empowered to create life peers for the purpose of hearing appeals from the Supreme Court to the House of Lords, and these peers are entitled to sit and vote. Appellate Jurisdiction Acts, 1876, and 1887 (39 & 40 Vict. c. 59; 50 & 51 Vict. c. 70).

At common law there can be no prescription against the Crown. *Wheaton v. Maple* (C. A. 1893), 1893, 3 Ch. 48, 62 L. J. Ch. 963, 69 L. T. 208, 41 W. R. 677.

*Roe d. Johnson v. Ireland*, the second principal case, was followed by Lord ELDON, in an action for specific performance, *Gibson v. Clark*, (1818), 1 J. & W. 159, 20 R. R. 266. The principle has the authority of the House of Lords. *Goodman v. Mayor of Saltash* (H. L. 1882), 7 App. Cas. 633, 52 L. J. Q. B. 193, 48 L. T. 239, 31 W. R. 293.

The presumption may, however, be rebutted. Thus, where the Crown was precluded from alienating the subject-matter, the Court refused to make any presumption of a lost grant. *Goodtitle d. Parker v. Baldwin* (1809), 11 East, 488, 11 R. R. 249. So, too, where the facts are apparent, the Court will not make the presumption. *Wheaton v. Maple* (C. A. 1893), *supra*.

#### AMERICAN NOTES.

"As a State cannot be disseised, so its rights cannot be barred by the statute of limitations, unless by express provision of some statute of its own." 3 Washburn on Real Property, citing *People v. Van Rensselaer*, 8 Barbour (New York), 189; *Lindsey v. Lessee of Miller*, 6 Peters (U. S. Sup. Ct.), 695; *Jackson v. Winslow*, 2 Johnson (New York), 80; *Cary v. Whitney*, 48 Maine,

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516. In the first of these cases the Court observed: "Another familiar principle was that no laches could be imputed to sovereignty, and it was privileged from the statute of limitations. That was so in England, and is applicable as a general rule to the State sovereignties of this country. So that formerly no length of possession would be a defence against the claims of the people, except in certain cases to raise the presumption of a grant. Adverse possession was therefore not properly predicable of Crown property. And this was a natural consequence where no Statute of Limitations affected the Crown, and the occupancy was presumed to be in subordination to the legal title."

"It is a well-settled principle that the Statute of Limitations does not run against a State. If a contrary rule were sanctioned, it would only be necessary for intruders upon public lands to maintain their possessions until the Statute of Limitations shall run, and then they would become invested with the title against the government and all persons claiming under it. In this way, the public domain would soon be appropriated by adventurers. Indeed it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary therefore to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government." *Lindsey v. Lessee of Miller*, 6 Peters (U. S. Sup. Ct.), 673. See *Oaksmith's Lessee v. Johnston*, 92 United States, 343. "The general principle is, that laches is not imputable to the government; and the maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions." *United States v. Kirkpatrick*, 9 Wheaton (U. S. Sup. Ct.), 720. See *San Pedro, &c. Co. v. United States*, 146 United States, 120.

The subject is discussed by Mr. Justice Story, with his accustomed learning, in *United States v. How*, 2 Mason (U. S. Circ. Ct.), 311, where he lays down the same doctrine, citing *Inhabitants of Stoughton v. Baker*, 4 Massachusetts, 521.

The maxim, *nullum tempus occurrit regi*, is applicable to the State in all civil suits. *Ninno v. Commonwealth*, 4 Hening & Munford (Virginia), 57; 4 Am. Dec. 488. Acts of limitation and bankruptcy do not bind the King nor the people. *People v. Herkimer*, 4 Cowen (New York), 345; 15 Am. Dec. 379. Time does not run against the Commonwealth. *French v. Commonwealth*, 5 Leigh (Virginia), 512. A statute of limitations does not run against the sovereign power, unless expressly provided. *City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; 32 Am. Dec. 718; *Commonwealth v. McGowan*, 4 Bibb (Kentucky), 62; 7 Am. Dec. 737; *Peareson v. Arledge*, 2 Bailey (So. Car.), 101; 23 Am. Dec. 145; *Hoey v. Furman*, 1 Pennsylvania State, 295; 41 Am. Dec. 129; *Moody v. Fleming*, 4 Georgia, 115; 48 Am. Dec. 219; *Crane v. Reeder*, 21 Michigan, 24; 4 Am. Rep. 430; *Ward v. Bartholomew*, 6 Pickering (Mass.), 408.

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Nor against the United States. *United States v. White*, 2 Hill (New York), 59; 37 Am. Dec. 374. Laches is not chargeable to the government. *United States v. Williams*, 5 McLean (U. S. Sup. Ct.), 133; *United States v. Thompson*, 98 United States, 486.

See to the same effect, *State v. School District*, 34 Kansas, 237; *Des Moines v. Harker*, 34 Iowa, 84; *Gardiner v. Miller*, 47 California, 570; *Alton v. Illinois, &c. Co.*, 12 Illinois, 38; *Walls's Lessee v. McGee*, 4 Harrington (Delaware), 108; *Swann v. Lindsey*, 70 Alabama, 507; *Board of Trustees v. Auditor*, 80 Kentucky, 336; *Josselyn v. Stone*, 28 Mississippi, 753; *State v. Pinckney*, 22 South Carolina, 484. See Wood on Limitations, sect. 52; Sedgwick on Construction of Statutory and Constitutional Law, p. 84; Angell on Limitations, sect. 34, *et seq.*

The question whether a municipal corporation is subject to adverse possession is an extremely vexed one in this country, and is fully discussed in Dillon on Municipal Corporations, § 675, and the very numerous conflicting decisions are cited in 13 Am. & Eng. Ency. of Law, p. 714; 1 *id.*, 300. The great majority of the States hold that the plea is available. See *City of Wheeling v. Campbell*, 12 West Virginia, 36; Wood on Limitations, sect. 53. See *May v. School District*, 22 Nebraska, 205, 3 Am. St. Rep. 266; *City of Pella v. Scholte*, 24 Iowa, 283; 95 Am. Dec. 729.

If a sovereign State enters the courts of a foreign State as a suitor, it does so subject to the Statute of Limitations, like a private suitor. *Western Lunatic Asylum v. Miller*, 29 West Virginia, 326; 6 Am. St. Rep. 644; *Esley v. People*, 23 Kansas, 510.

Where adverse possession of land has been held for a very long time, there is a presumption of a grant from the State. *Davis v. McArthur*, 78 North Carolina, 357 (thirty years, citing *Fitzrandolph v. Norman*, T. R. 127); *Tray v. Norwich, &c. R. Co.*, 39 Connecticut, 382. Building a church on a tract of land in a thickly settled part of the State, and occupying a part thereof as a burial ground for ninety years, will raise a presumption of a grant of the land, or at least a pre-emption right from the Commonwealth sufficient to entitle to a recovery in ejectment against an individual. *Mather v. Trinity Church*, 3 Sergeant & Rawle (Pennsylvania), 509; 8 Am. Dec. 663.

“Thus although lapse of time does not of itself furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim, *nulium tempus occurrit regi*, yet if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long continued peaceable enjoyment, accompanied by the usual acts of ownership.” 1 Greenleaf on Evidence, § 45. This doctrine is recognized in *State v. Wright*, 41 New Jersey Law, 478, reviewing the English decisions; *Jackson v. McCall*, 10 Johnson (New York), 377.

*Mayor of Hull v. Horner*, 1 Cowp. 102, is much cited in this country.

No. 5. — *Rex v. Cotton, Parker, 112, 113.* — Rule.No 5. — REX *v.* COTTON.

(EX. CH. 1751.)

## RULE

A PERSON who has not completed his title to the property of the Crown debtor, before the date on which the writ of extent is tested, is subrogated to the claim of the Crown.

**Rex v. Cotton.**

Parker, 112-143.

*Crown. — Prerogative. — Extent. — Priority over subject.*

An immediate extent against the King's debtor, tested after a distress [112] for rent justly due to the landlord, with notice to the tenant being the King's debtor, and appraisement of the goods and chattels, but before sale, shall prevail against the distress.

*Judgment.*

Lord Chief Justice PARKER: —

The case upon the record is thus, — An extent issued out of this Court, tested the 14th day of October in the 21st year of his Majesty's reign, directed to the sheriff of the County of Huntingdon, against Philip Chapman, Esquire; upon a bond entered into by him and others to his Majesty, bearing date the 24th of March in the 8th year of his Majesty's reign, whereby they became jointly and severally bound to his Majesty in £1500 payable at a day then past.

\* And upon another bond, entered into by Philip Chapman and others, bearing date the 9th day of August, in the 20th year of his Majesty's reign; whereby they became jointly and severally bound to his Majesty in £8000 payable at a day then past.

And then the writ suggests, that neither of these sums had been paid.

The sheriff is therefore commanded, not to omit for any liberty in his bailiwick, but to take the body of the said Philip Chapman, and to keep him in prison till he shall have fully satisfied the said debts.

And the sheriff is also, on the oath of good and lawful men of his bailiwick, and by legal testimony of witnesses, and by all other



No. 5. — *Rex v. Cotton, Parker*, 113–115.

ways, means, and methods, whereby the truth may be the better known, to inquire what lands and tenements, and of what yearly value, the said Philip Chapman had in his bailiwick, on the said 24th of March, in the 8th year of his Majesty's reign, when he first became indebted, or at any time after.

And what goods and chattels, of what kind and value, and what debts, credits, specialties and sums of money, the said Philip Chapman, or any other person or persons in trust for him (the words of the writ are), now hath: That is, on the day the writ is tested.

And the sheriff is to cause all and singular the said [\* 114] goods and chattels, lands and tenements, debts, \* credits, specialties and sums of money, in whose hands soever they then remained, by the oath of good and lawful men to be appraised and extended; and to take and seize them into his Majesty's hands, that he may have them until he shall be fully satisfied his said debts, according to the statute in that case made.

And there is power given to the sheriff to call witnesses before him, and to examine them touching the premises.

And the usual proviso, not to sell without leave of the Court.

The sheriff has returned an inquisition, taken before him the 10th day of November in the 21st year of his Majesty's reign, finding several lands and goods not material to be stated in this case; but as to the goods claimed by Mr. Cotton, the present defendant, it is found, that the said Philip Chapman, on the said 14th day of October (being the test of the extent), and on the day of taking the inquisition, was possessed, as of his own goods and chattels, of and in the several goods and chattels of the several natures, kinds, and values, mentioned and specified in a schedule or inventory thereof to the said inquisition annexed, marked letter (B), amounting in value to the sum of £319 7s.

But the jury further find, that there was due and owing to John Cotton, Esquire, at Michaelmas then last, from the said Philip

Chapman, the sum of £257 6s. 6d. for rent of the premises [\* 115] whereon the said goods and \* chattels were so seized; and

that on the 12th day of October then last past, a distress was made of all the goods and chattels mentioned in the said schedule marked letter (B), for the said rent: except the haycock therein mentioned to be in Brickhill-Close, of the value of £10.

The jury find the notice of the distress in *hæc verba*; and that

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the schedule or inventory marked (B) contains an account of the goods and chattels which were distrained for Mr. Cotton's rent.

The defendant Mr. Cotton was advised, or did not think it proper, to rely upon the facts found in his favour by the inquisition; but has claimed property in this Court, of all the goods and chattels in the schedule or inventory marked (B) except the haycock in Brickhill-Close; and as to what he has so claimed, he has pleaded specially, that before the said 14th of October, on which day the said writ of extent issued, (to wit) on the first of March, 1743, he was, and continually since that time hath been, seized in fee of a messuage, barn, stable, garden, and several lands (naming the particular closes), with the appurtenances, situate and being at Connington, in the County of Huntingdon; and being the tenement and farm in the inquisition mentioned, whereon the goods and chattels mentioned in the schedule marked (B) were seized.

And the said John Cotton, being so seized of the said messuage or tenement, with the appurtenances, afterwards, and long before the said 14th of October, when the said writ of extent issued, (to wit) on the \*said first day of March, 1743, at [\* 116] Connington aforesaid, demised the said messuage and tenement, with the appurtenances, to the said Philip Chapman; to hold from Lady-day then next for one whole year; and so from year to year, as long as it should please both parties: yielding and paying, yearly and every year during which the said Philip Chapman should hold the said messuage and tenement by virtue of the said demise, the rent or sum of £171 11s. to be paid half-yearly, at Michaelmas and Lady-day, by equal portions.

By virtue of which demise the said Philip Chapman afterwards, (to wit) on the 26th of March, 1744, entered into the premises, and was possessed thereof; and held and enjoyed the same by virtue of the said demise, continually from thence, until, at and upon the said 14th of October, when the said writ of extent issued.

And the defendant, Mr. Cotton, further says, that £257 6s. 6d. of the said rent, for one year and an half, ending at Michaelmas in the 21st year of his Majesty's reign, at that feast, and on the 12th of October in that year, were in arrear and unpaid to him; wherefore he, before the day of issuing the said writ of extent, (to wit) on the 12th of October in the same year, entered into the premises, to distrain for the rent aforesaid so in arrear, and seized

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No. 5. — *Rex v. Cotton, Parker*, 116–118.

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and took all the goods and chattels mentioned in the schedule marked (B), except as aforesaid, being found on the said premises.

as a distress for the said arrear of rent, and impounded [\* 117] the same upon the premises, in such parts \* thereof as were most convenient; and immediately after taking the distress, (to wit) on the 12th day of October aforesaid, gave notice to the said Philip Chapman of the said distress, and of the cause of taking it.

Mr. Cotton further says, that the goods and chattels so distrained, or any of them, were not replevied within five days after the distress and notice aforesaid; and that after the expiration of the five days, he, together with Thomas Dix then being constable of the parish of Comington, in which the distress was taken, caused the said goods and chattels to be appraised by William Blott and John Bond, being sworn by the said constable to appraise the same truly, according to the best of their understanding; and the said two appraisers appraised the same at £280 14s. 6*d*. And the said defendant would have sold the said goods and chattels so distrained for the best price that could be got for the same, in order to the satisfaction of the said arrear of rent; and after satisfaction of the said arrear of rent, and of the charges of the distress, appraisement, and sale, would have left the overplus in the hands of the constable, for the use of the said Philip Chapman.

But the defendant Mr. Cotton says, that after the said distress, notice, and appraisement, and before the said goods and chattels, or any of them, were or could be conveniently sold, and whilst the same continued so impounded, the sheriff of the County of Huntingdon did seize the same into the King's hands, by colour of the said writ of extent.

[\* 118] \* Traverses — That the said Philip Chapman, on the said 14th of October, in the 21st year of his Majesty's reign, or at any time afterwards, was possessed, as of his own proper goods and chattels, of and in the goods and chattels mentioned in the said schedule or inventory marked letter (B) to the said inquisition annexed, or of any part thereof (except the haycock in the Brickhill-Close), in manner and form as is found by the inquisition: And concludes in common form, with praying, that the King's hands may be removed; and that the sheriff may be discharged from accounting for these goods; and that the defendant may be dismissed from this Court.

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Mr. Attorney-General has demurred generally to this plea; and the defendant has joined in demurrer.

Before I particularly enter upon the consideration of this case, I would premise two things, which are agreed by the counsel on both sides.

First. That if the goods distrained had been actually sold before the day on which the extent bears teste, that there would have been no colour for a seizure of them; for this plain reason, — That the extent authorizes the sheriff to seize Mr. Chapman's goods; and after sale the property would have been altered out of him, and vested in a stranger.

Secondly. And for the same reason, it is agreed, that if this had been the case of goods pawned or \*pledged by [\* 119] Mr. Chapman to Mr. Cotton, before the teste of the extent, they could not have been legally seized; because the property would have been immediately altered by the act of Mr. Chapman, and Mr. Cotton would have gained a special, though not an absolute property in them. Fitz. Barr. 121, Plowd. 487, prove no more as to pledges than what is admitted.

I shall now apply myself to this particular case.

And the general question is, — Whether goods are not liable to be seized on an immediate extent for the King's own debt, after a distress taken of the same goods by a landlord, for rent justly due to him, and before an actual sale of the goods?

And in order to determine this question, I shall consider the nature and effects of a distress.

A distress (so far as it is applicable to the present case) is where one takes the cattle or other things of another, in some ground or place, for rent in arrear; which cattle, or other things so taken, are to be kept in a pound until the distrainer be satisfied his rent, or the cattle or other things be released by due course of law, or in other words, are replevied, in order to enforce payment of the rent.

This being the nature of a distress, I will inquire into its effects.

First — Affirmatively.

\* Goods so distrained are not liable to the distress of [\* 120] another subject, because they were in the custody of the law. Bro. Distress, pl. 75.

Nor are they liable to another subject's execution, for the same reason. Bro. Pledges, pl. 28; Finch's Law, 11.



Nay, further, according to the case I am going to cite, where the King claims by forfeiture upon an attainder or outlawry, the subject shall have the benefit of his distress against the Crown, and the King cannot have it without redemption.

Bro. Pledges, pl. 31. A man distrains his termor for rent arrear, and after the termor is attainted for felony done before distress taken. And the opinion of the Court was, that the King should not have the distress as forfeited, without satisfying the party who distrained; for this was lawfully taken at the time of the distress: Otherwise, where the donor distrains the tenant in tail for rent, and after the tenant in tail is attainted for felony done before the distress; for there the donor may distrain the heir of the tenant in tail, after the execution of his father; yet in the first case he hath no other remedy.

Justice HARPER, in *Nicholls and Nicholls*, Plowd. 487, cites this case a little differently: That the Earl of Kent had a return of certain cattle in replevin, and the owner of them is attainted; the earl shall keep them against the King, till he is satisfied for the thing.

[\* 121] \* And it is also cited by Mr. Justice DODDERIDGE as law. 3 Bulstr. 17.

The distrainer may maintain a writ of rescous, if the cattle or other things are rescued before they are put into the pound; and a *Pacca fracta*, if they are unlawfully taken out of the pound after impounding: but these writs are for the injury done to the distrainer, and are not founded upon his property, as appears by the form of the writs in Fitz. Nat. Brev. 4to edit. 228, 230.

The distrainer's executor shall have the benefit of his testator's distress, 15 E. IV. 10, but he cannot be in a better condition than his testator was.

### Secondly — Negatively.

The distrainer neither gains a general nor a special property, nor even the possession, in the cattle or things distrained: He cannot maintain trover or trespass: for they are in the custody of the law by the act of the distrainer, and not by the act of the party distrained upon.

Mich. 20 H. VII. fo. 1, pl. 1. There it is expressly said by FROWICKE, Chief Justice of the Common Pleas, and not denied, that the distrainer hath neither property nor possession in the distress, for the pound is an indifferent place between them, and the

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party distrained is only restrained from the use of the distress till payment of the rent; and if a stranger takes the \*goods distrained out of the pound, the lord shall only [\*122] have a *Parco fracto*; and in the same case the tenant shall have an action of trespass, for the property remains in him: and it is not like a pledge, for he has a property for the time; and so of bailment of the goods to be redelivered, the bailee shall have trespass against a stranger, because he is chargeable over. Abridged Bro. Property, 52.

*Mores and Conham*, Mich. 7 Jac. C. B., Owen 123. It was agreed by the Court, that if a man takes a distress, he cannot work the distress, for it is only the act of law that gives power to the distrainer; for he hath no property in the distress, nor possession *in jure*. And it was agreed by Lord COKE and Mr. Justice WARBURTON, that when a man hath a special interest in a thing by act in law, he cannot work it, or otherwise use it; but contrary upon a special interest by the act of the party, as in case of a pawn.

The distrainer cannot tan a hide, because the marks for knowing it are taken away. *Duncomb versus Rere and Green*, Cro. Eliz. 783.

*Bagshaw and Gaven*, 1 Ro. Abr. 673, Letter P. pl. 8. Noy 119 held he cannot milk a cow.

And yet Cro. Jac. 147, 148 reports this part of the same case otherwise; that of necessity a cow may be milked to prevent her being spoiled: And 12 Co. 101 countenances this opinion. But this \*point not being now directly in judgment, we [\*123] leave it undetermined.

Goods distrained are in the custody of the law, Co. Lit. 47 b. As the distrainer could not use or work the distress, much less could he sell it, at common law.

And yet, in Madox's History of the Exchequer, 670, it is said, that when sheriffs had levied or distrained for the King's debts, it was their duty to sell or dispose of such distress at a just and reasonable price, so that the owner was not aggrieved thereby.

This brings me to consider the nature and effects of an immediate extent for the King.

The nature of an extent I have already stated from the writ in this cause, the words of which (so far as relates to the present case) are to seize into the King's hands the goods and chattels

which the King's debtor now hath; that is, on the day of the teste of the extent.

And the effect is, that an extent binds the property of the goods of the King's debtor from the teste of it.

41 E. III. Fitz. Execution 38. Execution upon a statute-merchant was sued in C. B. A writ out of chancery, rehearsing that the comuzor was the King's debtor in the exchequer, was shown, and therefore execution ceased till the King's debt [\*124] was levied: But \*it was prayed that process might be continued upon the roll in the mean time; but no *Capias* was awarded against the body.

3 E. VI. Dyer 67 b., *Stringfellow's Case*. He sued a writ of extent against Brownsopp, directed to the sheriff of Berkshire, whereby lands were extended and goods seized, but no liberate. A writ of prerogative issued out of the Court of Exchequer, reciting the King's prerogative to be first served; and commanding the sheriff to levy the King's debt of the goods, if sufficient, if not, then upon the lands; which writ was delivered to the sheriff after the day of the return of the first writ (although the first writ was not returned at the day), and the sheriff returned the special matter, that there were no goods or lands beyond what he had extended. But he was amerced: For he ought to have returned the extent, for the service of the King's debt; because the property of the goods and lands was not in Stringfellow, till they were delivered to him by a writ of liberate. But the book goes on — *Idco queri, quia contra opinionem multorum in templo*; because they were seized into the King's hands to be delivered to the party, and so they are in the custody and consideration of the law, and privileged from all other executions.

And Mr. Callis, in his reading on the statute of 23 Hen. VIII. of Sewers, 195, 196, thinks it to be the better opinion, that these goods and lands were not liable to seizure for the Crown.

[\*125] \* But notwithstanding the opinions of the gentlemen of the temple, and of Mr. Callis, I shall show *Stringfellow's Case* to be undoubtedly law.

Lord HOBART, in *Sheffield and Ratcliffe*, fo. 339, cites it as law; and says, that the sheriff was enforced, notwithstanding the custody of law, to serve the King.

And Lord Chief Justice Rolle, in the second volume of his Abridgement, 158, Letter G. pl. 2, has abridged this case, and

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says the sheriff ought to execute the extent for the King's debt, because the property of the goods and land was not in Stringfellow, before they were delivered to him by a writ of liberate, and therefore liable to the King's extent.

*The Queen and Tannar Arnold*, Mich. 8 Anne, in *Seaccario*. It was taken for granted by the Court, that an extent for the Queen's debt binds the property of the debtor's goods from the teste.

And Lord Chancellor HARDWICKE, when Chief Justice, in delivering the resolution of the Court of King's Bench, in *Brassey and Dawson*, Mich., 6th of his present Majesty, cited and relied upon *Stringfellow's Case*, as clear law; and said it was grounded on the general rule of preference allowed by law to the King's debts.

And though a sheriff may maintain trover or trespass, for goods taken in execution by him against a wrong-doer, because he is answerable over for the \*value (as was held in [\*126] *Wilbraham and Snow*, Mich. 21 & 22 Car. II. B. R., reported in 1 Mod. 30, 2 Saund. 47, and several other books); yet goods so taken in execution, and remaining unsold, are liable to seizure upon an extent.

But the counsel for the defendant rather seemed to admit, than to deny *Stringfellow's Case*; but endeavoured to distinguish it from the present case, by insisting that it was only applicable to the subject's execution, but not to a distress for rent.

But this distinction is not well founded; because the rule holds equally in the case of a seizure made by virtue of a warrant of commissioners of bankruptcy, and yet their warrant is no execution.

This was so held in the case of *The King against Crump and Henbury*, which is entered Easter, 20 Car. II. Roll 80, in the King's remembrancer's office, but judgment given in Easter, 22 Car. II. it is cited in the case of *The Attorney-General and Capel*, 2 Show. 481, and the pleadings are at large in Tremaine's Pleas of the Crown, 637.

I have also a short manuscript note of it, which reports it thus — One indebted to the Crown became a bankrupt, and a commission of bankruptcy was sued out against him, and an assignment was made of his estate; and an extent issued for the Crown, tested the day of the date of the assignment; and the extent was preferred; and this adjudged by my great predecessor Lord Chief Baron HALE.



[\* 127] \* Sir Bartholomew Shower reports it more fully, but to the same effect — Edward Lewis, indebted to the King by bond, 3d March, 19 Car. II. Extent on that bond dated 21st March; inquisition finds Lewis possessed 15th April. And then Captain Hanbury pleads his title: That Lewis, 5th March, became a bankrupt; that the 5th March a commission issued; that the 6th of March the commissioners found that Lewis was a bankrupt, before the date of the commission; that the 12th of March the goods in question were seized by a warrant from the commissioners; that the 21st March the commissioners of bankrupt assigned to the creditors, and thereby they became possessed. To this plea, the Attorney-General demurs generally; and judgment is given for the King: And although the goods were actually in *custodia legis*, yet, because the extent came before the property was vested by an assignment, it was held a good extent.

But it was objected by the defendant's counsel, that these Acts speak of creditors in general, without naming the King; and therefore it is within the known rule: That the king not being expressly named, shall not be bound. And they cited the case of *Audley and Halsey*, in Sir William Jones, 202, where it is held, that neither the statutes *de mercatoribus*, nor of the staple, nor the statutes concerning bankrupts, mention the king, and therefore he shall not be bound by them.

I admit this in general to be true; and yet the reason given by Sir Bartholomew Shower, in his reports, that the property [\* 128] was not altered, is the true reason; \* which will appear, by supposing that the extent in that case had issued the day after the date of the assignment; for then it would have been a clear case against the Crown, because the property of the goods would have been absolutely transferred out of the bankrupt, and vested in the assignees. The consequence of which would have been, that then they would have become the goods of other men; and when an extent came afterwards, it would have been to seize the goods of other persons: But the king cannot take the goods of strangers for his debt. This is the true distinction: Nothing bars the king but the assignment; and that bars him, because it has altered the property of the goods.

But the defendant's counsel insist upon another distinction between *Stringfellow's Case* and the present case: That in that case the execution was only in *fieri*, and executory till a liberate; but a

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distress was complete at common law, for the distrainer had then no power to sell.

To which I answer, that the distress was not complete, because it was no satisfaction; but supposing, for argument's sake, that it was, yet goods are liable to seizure on an extent till there is an alteration of property; and a distress is no alteration of property.

They then enforce this objection by two reasons.

First, That this would be very hard and inconvenient; because a man might have had a distress \*for ten or [\* 129] twenty years, and yet lose the benefit of it by an extent.

But length of time will not mend the distrainer's condition; according to the maxim, *Quod ab initio non valet tractu temporis non convalescit*.

Secondly, That levy by distress is a good bar; and it would be very strange that the landlord should be deprived of the benefit of it, and not be at liberty to distrain *de novo*. *Vasper and Eddowes*, Mich. 12 W. III. B. R. reported in 1 Salk. 248, was cited to prove this.

To which I answer, That it is agreed in that case, that if the distress dies in the pound, or escapes without the default of the distrainer, his remedy revives, and he may distrain *de novo*. *Dyer* 280 a. b.; *Hob.* 61. And by the same reason he may distrain *de novo* when the distress is legally evicted without his default; for levy by distress is only a temporary bar, but no satisfaction.

It was then objected, that by a distress the distrainer gains a right to detain the goods distrained till payment of the rent; and this was resembled to the case of an innkeeper who may detain a horse for his keeping, tho' (as it was said) he has no property; and that the property in this case is immaterial.

As to the case of an innkeeper, no authority was produced, to show whether he did gain a property or not; and whoever will give themselves the trouble to \*compare the case [\* 130] of *Rosse and Bramsted*, 2 Rolle's Rep. 438, with the case of the *Hostler*, Yelv. 66, will find, that very learned Judges have differed in opinion upon this point: But take it either way, if no property is gained by the innkeeper, it is arguing in a circle, and in effect begging the question; if a property is gained then it is not applicable to the present case, because it is agreed on all hands, that the horse would not be liable to seizure on an extent.

And we deliver no opinion upon the case of an innkeeper, because it is not now judicially before us.

But I must confess, that the latter part of the objection (that the property is immaterial in this case), greatly surprised me, because the gentleman who insisted upon this seems to have forgot his client's plea; (but he was very excusable, considering the avocations he then had, and the continual hurry he was in); for the plea has expressly traversed Mr. Chapman's property in the goods in question, at the time of issuing the extent: And if the property is immaterial, then here is an immaterial traverse, and the plea is bad on that account; for a traverse in pleading ought ever to be material, and issuable. But the traverse is very proper; because it traverses the title of the Crown found by the inquisition.

For in the case of *The King and Mann*, Hilary, 1726, in this Court, it was expressly laid down by Lord Chief Baron PENGELLY, that whoever pleads to the title of the Crown, found by an inquisition, is obliged to traverse that title so found; and not to put the Crown to traverse the title set up by the defendant, or [\* 131] to \*force the Crown to take a traverse; though the Crown has an election to traverse the inducement or title set out by the defendant. And Palmer 81, Keilway 175 a., Vaugh. 62, and 2 Jo. 9, 10 are to the same purpose.

But the fault in this plea is, that the inducement to the traverse is wholly insufficient; for pleading a distress for rent shows no alteration of the property of the goods distrained, but they, notwithstanding the distress, continue liable to seizure on an extent.

And according to the rules of pleading, even between subject and subject, there ought to be a proper inducement to every traverse, to show the matter contained in the traverse to be material: for though the inducement to the traverse is not traversable generally, yet it ought to be such as if true will defeat the title of the other party, otherwise the traverse amounts to a negative pregnant. And this is fully laid down in Bro. Pleadings, pl. 35; *Witham and Barker*, Mich. 6 Jac. I. B. R. Yelv. 147; *Johnson and Sir Henry Rowe*, Trin. 8 Car. I. B. R. Cro. Car. 265; *Dile and Ricks*, Mich. 9 Car. I. Cro. Car. 335; *Newland and Collins*, Mich. 5 Geo. I. C. B., Lord Chief Baron Comyns's Reports, 302.

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And improper inducements are ridiculed in Yelverton; as if you might as well induce a traverse, by saying “Robin Hood in Barnwell stood.”

And this is still stronger in the case of the Crown: For whoever pleads off the King’s hands ought to show \* a title [\* 132] prior to that found by the inquisition; and the King (as I have shown already) is not confined to take issue upon the traverse offered by the defendant, but has an election, to traverse the inducement or title set out by him.

But there is something very particular in this plea, that must be taken notice of: The defendant has pleaded the distress and notice to be on the 12th of October; that the goods not being replevied, he after the expiration of five days caused them to be appraised; and that he would have sold them, if he had not been prevented by the seizure upon the extent.

But the extent issued on the 14th of October, and the property of the goods was bound that day; and pleading a subsequent appraisement, and an intent to sell, is pleading an act and an intent contrary to law, and therefore vain and nugatory; and a subsequent appraisement is so far from avoiding the title of the Crown, that an appraisement prior to the issuing of the extent would not have been sufficient to have done it: For it appears by Tremaine’s Pleas of the Crown, 640, that in the case of *The King* against *Crump and Hanbury*, already cited, a prior appraisement was pleaded; and yet the plea was held ill, and judgment given for the King. Nor can the intent to sell avail the defendant, as is held in Dalison’s Rep. 71, *Webb* and *Paternoster*, Palmer 71, 2 Rolle’s Rep. 152, and *Kidder* and *West*, 3 Lev. 167.

But besides, an appraisement is only a preparatory step towards a sale; and an intent to sell is no sale; \* and the [\* 133] property of the goods distrained could only be altered by an actual sale.

The defendant’s counsel then rely on the case of the 13 Ric. II. Bro. Pledges 31, and cited in Plowden and 3 Bulstr. That where the King claims by forfeiture upon an attainder, the subject shall have the benefit of his distress, against the Crown; and that the King cannot have it without payment of the rent: And that the same rule ought to hold in the present case.

Mr. Attorney and Solicitor-General, on the other hand, insist, that there is a difference between the case relied upon, and the



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present case; because where the King claims by forfeiture, he claims under the forfeiting person, and can have no better right to the goods distrained than he had, though in some respects he may have a better remedy. But, in the present case, both the King and Mr. Cotton are creditors of Mr. Chapman, and are both pursuing their legal remedies for their debts: And the contest in this suit is for preference of satisfaction; and that the King is entitled to that preference by prerogative.

The defendant's counsel controvert this proposition: That in case of a forfeiture the Crown claims under the forfeiting person; and insist, that in that case, as well as the present, he claims by prerogative.

And they cited several cases, which I will consider. Plowd. Com. 262, *Dame Hale's Case*. Husband and wife, joint tenants of a term for years; the husband is *felo de se*, he shall forfeit [\* 134] the whole; and yet there \*it survives till office:

But after office, it shall have relation to the time of the death. The reason of this is, because the title of the Crown and of the wife concurring in the same instant, the title of the Crown shall be preferred.

9 Co. 129, *Quick's Case*, immaterial: For there the Crown did not claim by forfeiture, either under an attainder or outlawry.

The next is *Knight's Case*, 5 Co. Rep. 56 a. b. And in many cases the King, who claims by a subject, shall be in a better case, in respect of the dignity and prerogative incident by the law to the royal person of the King, than the subject himself by whom he claims.

This shows, that the King claims by the subject; which was one of the things contended for by Mr. Attorney and Solicitor.

I now proceed to Lord COKE's instances.

As, if the King has a rent-seck by attainder of treason, or by grant, he shall distrain for it not only in the land charged, but in all his other lands; and yet the subject by whom he claims shall not distrain for it.

This instance does not alter the nature of the rent; but only shows that the King shall have a better remedy than the forfeiting person would have had if he had not forfeited.

[\* 135] \*The next instance is, If a subject has a recognizance or a bond, and afterwards is outlawed or attainted, the King shall seize all the lands of the conusor or obligor, whereas he

himself could have but a moiety. The same is in Cro. Jac. 513; Hardr. 24.

But this is still but a further advantage in point of remedy.

So in the case then at bar, the King shall take advantage of the condition, without demand; yet the prior himself, under whom the King claimed, could not re-enter in default of payment of the rent, without a demand made.

This is still but a further advantage in point of remedy; and, besides, the King did not claim these by forfeiture, but surrender.

The last instance is, If the King purchase a seignior, of which land was held by posteriority, the King shall be in a better condition than the subject from whom he claims, and shall have the priority.

. In this instance the King claimed by purchase, and not by forfeiture; and so not applicable to the present case.

The next case is in 1 Lord Hale's Pleas of the Crown, 254. If tenant in tail of the gift of the King, the reversion in the King, make a lease for years, and then is attainted of treason, the King shall avoid that \*lease; for the King is in of [\*136] his reversion, though the tenant in tail have issue living. This hard case is so adjudged in the commentaries. *Austin's Case*, *in fine*.

Lord HALE gives the reason of this case, That the King was in of his reversion; but if you will look into Plowden, 560, you will find that the law would have been quite otherwise, if the King had claimed by forfeiture; for then he must have had the land charged with the lease: So that this case is far from being an authority in favour of the defendant.

The last case is, *The King and Baden*, Show. Parl. Cases, 72. Baden had a judgment against Clarke; and after his judgment, Clarke is outlawed at the suit of Allen; and upon the outlawry an inquisition is taken, and the lands seized into the King's hands; and then Baden takes out an *clegit*, and has a moiety delivered to him; and then comes into this Court, and pleads as terre-tenant, to remove the King's hands. But judgment was given for the King, and affirmed in the Exchequer Chamber; and afterwards in the House of Lords, 20th February, 1694; upon this particular reason, not applicable to the present case: That he who pleads off the King's hands ought to have a legal title prior to the estate found by the inquisition; and it was his own laches and default that

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he did not perfect his title, by suing out an *elegit* and extending the lands, before the taking of the inquisition upon the outlawry; for then he would have had a good title against the Crown.

[\* 137] \* I now proceed to deliver the sense of the Court upon this point. We think that there is a difference between cases where the King claims by forfeiture, upon an attainder or outlawry, and where he sues for the recovery of a debt; because a man can only forfeit what he has, though the King may in respect of the forfeiture be entitled to advantages in point of remedy, which the forfeiting person would not have been entitled to in case he had not forfeited: And that an estate which is not forfeited even for treason, may yet be liable to the satisfaction of the King's debt.

I shall support this difference by authorities.

That a man can only forfeit what he has, is laid down in *Plowd.* 487.

*Cranmer's Case*, 1 And. 19, Mo. 100, Cranmer, Archbishop of Canterbury, made a feoffment of lands to the use of himself for life, and after his decease, to the use of his executors and assigns for twenty years, and after to the use of Thomas Cranmer in tail: The archbishop was attainted of treason. And if this was an interest in the archbishop, or not, was the question. And it was held it was not, and that therefore he could not forfeit it.

And yet what is not forfeited even for treason, may be liable to the King's extent.

[\* 138] \* *Sir William Smith and Wheeler*, Easter 23 Car. II. B. R., 1 Ventr. 128, 2 Keb. 772. The question was, Whether a lease which Simon Maine had power over, who was attainted of treason as one of the regicides, was forfeited or not? And held it was not; because the power was inseparably annexed to his person, and because the power was not found to be executed.

But Mr. Justice VENTRIS, fo. 132, reports, that Lord HALE said, As to execution for the King's debt, it differs; for the process ever did and does run, *De terris de quibus illi, aut aliquis ad eorum usum*. It is true, that in *Sir Charles Hatton's Case* it was resolved, that the King's debt should be executed upon land wherein he had a power of revocation.

Mr. Keble, fo. 775, reports, That all process for the King's debts is, *De quibus D.* or any other to his use, is seized: So it differs largely from this.

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I have seen a very accurate manuscript report of that case; by the favour of my brother LEGGE, which reports the difference in these words: —

There is a difference between the King's debts and this case; for the King shall extend the land when there is nothing in the debtor but only a power: Otherwise here.

And that a power of revocation will subject lands to the King's extent, is held in *Sir Edward Coke's \* Case*, [\*139] Godb. 39, and other books, and cited in Hob. 339 and Hardr. 24.

It was then objected, that the King's prerogative must be immemorial, Plowd. 322, Hardr. 27; and no extent could have issued on such a bond as this till the statute of 33 Hen. VIII. c. 39, s. 55, therefore the King can have no such prerogative.

I admit that the King's prerogative depends upon prescription, usage, or statute, which the Court must determine; but when power is given by that statute to issue process upon such a bond by *capias* or *extendi facias*, as in their discretions shall be expedient, such extents shall have the same effects as an extent issued upon a statute-staple or judgment at common law.

New things are governed by old laws. *Lane and Cotton*, 1 Salk. 18; 1 Lord Raym. 654.

It is further objected, That the King's prerogative can do no wrong; but the King can have no such prerogative as is here claimed, because it would be injurious and prejudicial to the subject. Plowd. 487.

The same law which gives the subject the property in his goods, establishes the King's prerogative; and here is no injury, though there may be some hardship: And the same objection would equally hold against *Stringfellow's Case*, and the case of *The King* against *Crump and Hanbury*; and yet they are undoubtedly law.

\* Another objection was, That this prerogative is not [\*140] taken notice of in the statute *De Prerogativa Regis*.

The King has several prerogatives not enumerated in that statute. Plowd. 322; *The King and Queen* and *Dr. Birch*, 1 Ld. Raym. 23.

Another objection was, That the statute of 2 W. & M. was made in favour of landlords, and it could never be the intent of it to lessen the landlord's former remedy.



It is so far from lessening it, that it has enlarged it, by giving the landlord power to sell after the expiration of five days; but this power supposes the property to remain in the tenant till a sale is made pursuant to the statute.

The last objection was, That where a prerogative is claimed by prescription, precedents ought to be shown of the judicial allowance of that particular prerogative; but none are produced by the counsel for the Crown.

To which I answer: —

First, Though no precedents are produced, yet this case falls within the principle of *Stringfellow's Case*, and of the case of *The King* against *Crump and Hanbury*, That where the property of goods is not divested out of the King's debtor, they are [\* 141] liable to \*seizure upon an extent; and where the reason is the same, the law must be the same.

But, secondly, Our predecessors above thirty years ago were of opinion, that goods distrained for rent, and not sold, were liable to seizure upon an extent.

*The King* and *Dale*, Easter, 1719, in this Court: An extent, bearing teste the 4th of November, issued against Dale, by virtue of which corn and hay were seized; but Mitchel the landlord having distrained the same for rent the 29th of October before, refused to let it go; upon which an attachment was moved for against Mitchel: The goods not having been sold within five days pursuant to the Act, 2 W. & M., no property was divested by the distress, and they were in the landlord's hands only in order to his satisfaction; but this being a point of law, Mitchel was supposed not to understand, and being the sheriff, was negligent in executing the *renditione exponas*, the Court refused to grant an attachment.

Here is an express authority in point; and is not weakened by the objection, that the Court did not grant an attachment, because it is every term's experience not to proceed to rigour and extremity, where a contempt is not wilful, but only by mistake; and they in such case only take care to have justice done, or satisfaction made.

This plea therefore cannot be supported, without overturning a principle of law unquestionably established, [\* 142] \*and contradicting the opinion of the Court in the case of *The King* and *Dale*.

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For these reasons, we are all of opinion, that judgment ought to be given for the King.

The defendant, having succeeded to the title of a baronet, brought a writ of error, directed to the treasurer and barons; assigned errors; and Mr. Attorney joined in error: And then the writ of error abated by the death of Sir John Cotton. And a question arose, Whether the new writ of error ought to be directed to the treasurer and barons, as the former writ was, or to LORD CHANCELLOR? And Lord Chancellor HARDWICKE, and the Lord Chief Justices LEE and WILLES, after taking time to consider of it, delivered their unanimous opinion, in the Exchequer Chamber, that it ought to be directed to the treasurer and barons; according to *Sir William Pelham's Case*, 1 Co. Rep. 11, 12; *Altonwood's Case*, 1 Co. Rep. 34, 38; *Sir William Herbert's Case*, 3 Co. Rep. 11, 15, and *Polhill and Cate*, 1 Jo. 14. But contrary to *Walsingham's Case*, Plow. Com. 564, 565, and Sav. 39.

Lady Cotton, as executrix to Sir John, accordingly brought a writ of error, directed to the treasurer and barons; assigned errors: And Mr. Attorney having joined in error, this case was argued before the Chief Justices RYDER and WILLES, by Mr. Starkie for Lady Cotton, and by Mr. Solicitor-General for the King. And Mr. Perrott was retained by Lady Cotton, for a second argument; but he having nothing further to \* offer than had been insisted upon by Mr. Starkie, LORD [\*143] CHANCELLOR, by the advice of the CHIEF JUSTICES, affirmed the judgment on Tuesday, the 10th day of June, 1755, in the Exchequer Chamber; and Lady Cotton, pursuant to the opinion of her counsel, acquiesced, and answered the value of the distress to the Crown.

## ENGLISH NOTES.

The principal case was distinguished in *Rorke v. Dayrell* (1791), 4 T. R. 402, 2 R. R. 417, on the ground that in *Rex v. Cotton*, the claim of the Crown under an extent prevailed over a subject claiming under a distress for rent, but that it did not follow that an extent by the Crown would prevail over the execution of the subject. *Rorke v. Dayrell* was, however, overruled by the House of Lords in *Giles v. Grover* (H. L. 1832), 1 Cl. & Fin. 72, 9 Bing. 128, 2 Moo. & Sc. 197. The judgments of the judges consulted in that case contain a careful review of the authorities down to the date of the decision.

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The case of *Attorney General v. Leonard* (1888), 38 Ch. D. 622, 57 L. J. Ch. 860, 59 L. T. 624, 37 W. R. 24, depends upon a similar principle. In that case the lessees of the Crown had distrained the goods of their sublessees for rent in arrear. Before the goods were sold the Crown applied for an injunction to restrain the sale with a view to assert its title to the goods by distress for the rent due under the head lease. An interim injunction was granted, with liberty to apply in the event of there being a surplus after the Crown had been satisfied. This liberty to apply was an adaptation of the Chancery practice to give effect to a common law right. *In re De la Motte; Rex v. De La Motte* (1857), 2 H. & N. 589, 27 L. J. Ex. 110.

In addition to things which may be seized in execution at common law, the following may be seized under an extent:—An equity of redemption, *Rex v. De la Motte* (1801), Forrest, 162, 5 R. R. 714; Money deposited in Court, *Monks' case* (1673), 1 Vent. 221; Cash notes, cheques, and bills of exchange, *Rex v. Lambton* (1818), 5 Price, 428, 19 R. R. 645.

The extent operates from the earliest moment of the day on which it is tested. *Edwards v. Reg.* (Ex. Ch. 1854), 9 Ex. 628, 23 L. J. Ex. 165, 18 Jur. 384. This case must be taken as overruling *Savin v. Morland* (1819), 1 Brod. & Bing. 370, 3 Moo. 740, Gow N. P. 39, 21 R. R. 651.

In certain cases, however, the prerogative right of the Crown has been limited to prevent actual injustice. Thus, where the Crown seized under an extent a bill of exchange, the remedy upon which was barred by the statute of limitations, it was held that a plea of the statute could be pleaded against the Crown. *Rex v. Morrell* (1824), 6 Price, 24. With this case may be compared *Sir Edward Dimock's case* (1610), Lane, 65, where it was held that an assignment to the Crown, after the death of the obligor, of a debt due to a subject, did not give the Crown its prerogative priority in the administration of the deceased person's estate. So, too, upon an extent against one partner, the Crown can only take the separate interest of the partner, and that subject to the partnership debts. *Rex v. Sanderson* (1810), Wightwick 50, 12 R. R. 713. Again, where two of several partners had assigned portions of their shares to the other members of the firm in trust, for the purpose of paying the assigning partner's debts, and it appeared that the transaction was *bona fide*, and intimated to parties who might be affected, and entered in the books of the firm, it was held that the portions of shares assigned could not be seized under an extent issued against the assigning partners. *Spears v. Lord Advocate* (H. L. Sc. 1838), 6 Cl. & Fin. 180, 1 Rob. 585.

The Crown takes subject to an equitable mortgage by deposit of title

No. 6. — *Rex v. Davies*, 5 T. R. 626–629. — Rule.

deeds made by a simple contract creditor of the Crown. *Casperd v. Attorney General* (1819), 6 Price, 411, Dan. 238, 20 R. R. 671 (cited and followed by Lord COTTENHAM in *Spears v. Lord Advocate*, *supra*, see 6 Cl. & Fin. 190).

In *Wells v. Pickman* (1797), 7 T. R. 174, 4 R. R. 410, the Court enlarged the time within which the sheriff was to make his return to a *fi. fa.*, upon a suggestion of a reasonable doubt respecting the priority of a Crown execution affecting the goods seized. This would offer a way out of the difficulty in which a sheriff is sometimes placed by reason of the Crown being exempted from the provisions of the Interpleader Act. *Candy v. Maugham* (1843), 13 L. J. C. P. 17. The jurisdiction exercised by the Court of Chancery prior to the Interpleader Act would not, it is conceived, be applicable. *Whitehouse v. Partridge*, (1818), 3 Swanst. 365, 19 R. R. 216.

In *Butler v. Butler* (1801), 1 East, 338, 6 R. R. 276, the sheriff obtained a rule calling upon the plaintiff in the action and the solicitor of Excise, who represented the Crown, to show cause why he should not be at liberty to pay the proceeds of sale of goods seized under a *fi. fa.*, into Court, after deducting his charges, for the use of the person or persons who should be found entitled to the same, and that the proceedings against the sheriff might be stayed. The Court of King's Bench, however, upon the citation of a precedent, *The Attorney General v. Aldersey* (a report of which is set forth in the report of the case in East, 1 East, 341, 6 R. R. 279), discharged the rule.

No. 6. — REX *v.* DAVIES.

(K. B. 1794.)

## RULE.

THE Crown is not bound by a statute, unless it appears on the face of the Act that the Crown should be bound by it. But the Crown may claim the benefit of the provisions of any Act of Parliament.

**Rex v. Davies.**

5 T. R. 626–629 (s. c. 2 R. R. 683).

*Crown. — Prerogative. — How far bound by Statute. — Crown not named in Statute.*

The full report of the case will be found as No. 5 of “*Certiorari*.” 5 R. C. 543.



## ENGLISH NOTES.

Among the more recent cases in which the rule has been recognized and applied, may be cited the following. *Re Cuckfield Burial Board* (1854), 19 Beav. 153, 24 L. J. Ch. 585, and the cases cited in the notes in Beavan; *In re Smith* (1876), 2 Ex. D. 47, 46 L. J. Ex. 75, 35 L. T. 858; *Attorney General v. Constable* (1879), 4 Ex. D. 173, 48 L. J. Ex. 455, 27 W. R. 661; *Wheaton v. Maple* (C. A. 1893), 1893. 3 Ch. 48, 62 L. J. Ch. 963, 69 L. T. 208, 41 W. R. 677.

In *Reg. v. Cruise* (1851), 2 Ir. Ch. Rep. 65, both the points mentioned in the rule arose. It was held in that case that the Crown, although not named in the Irish Statutes, 5 & 6 Will. IV. c. 55, and 3 & 4 Vict. c. 105, which gave to creditors by judgment or recognizance a right to have a receiver appointed on petition, might take advantage of those Acts, but that the Crown was not bound by the restriction imposed upon that right by the subsequent statute 12 & 13 Vict. c. 95, s. 10.

The decisions respecting the liability of Crown or public property to be assessed to the poor's rate, at first sight present a difficulty. The liability, if it exists, depends upon beneficial occupancy, which is a question of fact. Where the occupation is restricted, and merely to enable the occupier to fulfil public duties, the servant of the Crown cannot be rated in respect of his occupation. *Lord Anherst v. Lord Somers* (1788), 3 T. R. 372, 1 R. R. 497; *Pearson v. Holborn Union* (1893), 1893. 1 Q. B. 389, 62 L. J. M. C. 77, 68 L. T. 351. Where, however, there is a beneficial occupation, beyond the exigencies of the public service, the property is rateable. *Lord Bute v. Grindall* (Ex. Ch. 1793), 2 H. Bl. 265, 1 T. R. 338, 1 R. R. 220; *Showers v. Chelmsford Union* (C. A. 1891) 1891, 1 Q. B. 339, 60 L. J. M. C. 55, 64 L. T. 755, 39 W. R. 231.

In the case of a royal palace the question arises whether or not the palace is put to uses incompatible with a royal residence. *Attorney General v. Dakin* (H. L. 1870), L. R., 4 H. L. 338, 39 L. J. Ex. 118, 23 L. T. 1, 18 W. R. 1111.

It was formerly said that an Act passed for the general good or benefit would be binding on the Crown although not named, but the tendency of later times is to discountenance any distinction of that character. *Rex v. Osbourne* (1818), 6 Price, 94, 20 R. R. 619.

In connection with this subject may be cited *Attorney General v. Morgan* (C. A. 1891), 1891, 1 Ch. 432, 60 L. J. Ch. 126, 64 L. T. 403, 39 W. R. 324, where a strict construction was given to an Act limiting the Royal Prerogative. It was held that the relaxation in favour of the subject, effected by the 1 W. & M. c. 30, and 5 W. & M. c. 6, in regard to the rights of the Crown in "Royal Mines," did not apply to a

No. 6. — *Rex v. Davies.* — Notes.

mine which was worked exclusively as a gold mine, although the gold was mixed with the baser metals mentioned in the statutes. The Court held this circumstance to be immaterial if the quantity of the baser metals was so small as to be valueless for the purpose of working.

## AMERICAN NOTES.

The American doctrine is uniformly settled that the Government or a State is not bound by a statute unless named in it. Endlich on Interpretation of Statutes, sect. 161. "The general business of the legislative power is to establish laws for individuals, not for the sovereign." *Jones v. Tatham*, 20 Pennsylvania State, 398. "At all events," says Mr. Endlich, "the Crown is not reached except by express words or by necessary implication, in any case where it would be ousted of an existing prerogative or interest." See *Inhabitants of Stoughton v. Baker*, 4 Massachusetts, 521; *State v. Milburn*, 9 Gill (Maryland), 105; *Alexander v. State*, 56 Georgia, 478; *Cole v. White County*, 32 Arkansas, 45; *United States v. Greene*, 4 Mason (U. S. Circ. Ct.), 427; *Green v. United States*, 9 Wallace (U. S. Sup. Ct.), 655; *Martin v. State*, 24 Texas, 61; *State v. Kinne*, 41 New Hampshire, 238; *State v. Garland*, 7 Iredell Law (Nor. Car.), 48. Thus the Bankrupt Act does not allow a discharge from a debt due the Government. *United States v. Herron*, 20 Wallace (U. S. Sup. Ct.), 251, approving *Woods v. DeMatteo*, 3 Hurl. & C. 987. So of a discharge under the Act to abolish imprisonment for debt. *People v. Rossiter, gentleman*, 4 Cowen (New York), 143, saying, "The rule is the same as in England." The State is not bound by a law restricting judgment liens unless the intent is clearly manifest. *Josselyn v. Stone*, 28 Mississippi, 753.

Mr. Sedgwick says (Construction of Statutory and Constitutional Law, p. 27): "It is held that words of a statute applying to private rights do not affect those of the Crown. This principle is well established, and is there considered indispensable to the security of the public rights. It has been recognized also in this country; and on this ground it was held in Pennsylvania, in regard to Windmill Island, in the Delaware river, opposite Philadelphia, though it was claimed under a legislative grant, that as the rights of the Commonwealth were not ceded by the Act, no title was acquired as against the State. But in this country, generally, I should doubt whether this construction could be safely assumed as a general rule. The English precedents are based on the old feudal ideas of royal dignity and prerogative; and where the terms of an Act are sweeping and universal, I see no good reason for excluding the Government, if not specially named, merely because it is the Government."

In *United States v. Hoar*, 2 Mason (U. S. Circ. Ct.), 311, Mr. Justice Story said: "Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the Legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the Legislature are meant to regulate and direct the acts and rights of citizens; and in most cases

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the reasoning applicable to them applies with very different, and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the Government or affect its rights, unless that construction be clear and indisputable upon the text of the Act."

In *Green v. United States*, *supra*, it was held that an Act of Congress permitting parties to civil actions in the Federal Courts to be witnesses on their own behalf, applies to cases in which the Government is a party as well as to suits between private parties.

The State is bound by a statute concerning elections. *Commonwealth v. Garrigues*, 28 Pennsylvania State, 9. If the State goes into the business of banking it is bound by a statute of limitations. *Calloway v. Cossart*, 45 Arkansas, 81. A State Homestead exemption applies as against the Federal Government. *Fink v. O'Neil*, 106 United States, 272. So of a privilege of jail limits under an Act for imprisonment for debt. *United States v. Knight*, 14 Peters (U. S. Sup. Ct.), 301.

Under the railroad law, the lands of the State may not be taken without compensation. *Commonwealth v. Boston & M Railroad Co.*, 3 Cushing (Mass.), 25; *Seattle, &c. R. Co. v. State* (Washington), 22 Lawyers' Rep. Annotated, 217.

A State may plead the Statute of Limitations. *Barter v. State*, 10 Wisconsin, 454; *Gaines v. Hot Springs County*, 39 Arkansas, 262; *Auditor v. Halbert*, 78 Kentucky, 577. Mr. Wood disapproves this doctrine. Limitations, sect. 52. And it has been doubted that the Government can acquire title by adverse possession against a citizen. *San Francisco S. Union v. Irwin*, 28 Federal Reporter, 708.

But the Federal Government is not a "person" within the Statute of Wills, qualified to take by devise. *Will of Fox*, 52 New York, 530; 11 Am. Rep. 751; 94 United States, 315.

Nor is the Federal Government entitled to the use of a patented device without compensation. *James v. Campbell*, 104 United States, 356, disapproving *Feather v. The Queen*, 6 B. & S. 257; *Dixon v. London Small Arms Co.*, 1 App. Cas. 632.

Mr. Endlich says (Interp. of Statutes, sect. 167): "The test therefore in every case in which the question whether or not the Government is included in the language of a statute has to be met and determined, cannot be a mere general rule either one way or another, arbitrarily applied, but must be the object of the enactment, the purposes it is to serve, the mischiefs it is to remedy, and the consequences that are to follow, — starting with the fair and natural presumption, that primarily the Legislature intended to legislate upon the rights and affairs of individuals only."

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 No. 7. — *Rex v. Capper*, 5 Price, 217, 223 n. — Rule.
 

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SECTION II. — *Crown Grants.*No. 7. — *REX v. CAPPER.*

(EX. 1816.)

## RULE.

CROWN grants are construed strictly, and the introduction in a patent of general words of reference to a prior grant of the subject-matter to the Crown (*e.g.*, *in tam amplo modo* as the grantor to the Crown had it), will not extend the operation of a Crown grant beyond the precise terms of the patent.

*Rex v. Capper.*

5 Price, 217–268 (s. c. 19 R. R. 568).

*Crown Grant. — Construction.*

Grant of a *liberty* in a certain manor to A. who grants the manor, [217] with, &c. to the Crown. The Crown grants the manor again to B. with all, &c. *liberties*, &c. in, &c. in as full and ample manner as A. had it, — such re-grant passes nothing, but what is expressly mentioned in words, as the subject-matter of such grant, notwithstanding the words of reference to the former grant, which do not extend the operation of the later beyond the precise terms of the patent.

A grant of a *liberty* in a manor of goods and chattels of tenants in such manor, attainted of felony, is confined to the goods &c. of felons being *locally situate within* the manor, and does not pass goods &c. lying *out of* it. *Seemle*, that if the words were “in, of, or upon,” it could not be so extended.

Stock, and money in the funds, are not goods and chattels, and do not pass by a grant of *bona et catalla felonum*.

Stock has no locality, except for purposes of probate and administration.

Stock is a *chose in action*.

The questions which arose on a demurrer to a replication by the Attorney-General, depended upon the construction and effect of certain letters patent, the tenor of which sufficiently appears from the following extracts: —

By letters patent, of Edward IV. bearing date at [223 n.] Westminster, the 15th day of April, in the second year of his reign, after reciting various former grants of his progenitors and successors, and confirmations, and extensions thereof, all of



which he himself confirmed. And reciting, that the said Edward the 4th being moreover willing to show to the said Archbishop more abundant grace in that behalf, &c. &c. did grant and confirm, and by the same letters patent did, for him and his heirs, as much as in him laid, declare, grant and confirm, that the aforesaid then Archbishop, and his successors, and all their men and tenants, as well entire tenants as not entire tenants, residents and non-residents, and all other residents in, of, or upon the lands, lordships, possessions and fees of the aforesaid then Archbishop, and his successors, although they should be tenants of the same King or his heirs, or of any other persons whomsoever, should be quit throughout his whole kingdom of England, of all toll in every market, and in all fairs, and in all passages of bridges, rivers, ways, and the sea, throughout his whole kingdom of England, and all the lands of the same King, wherein he might give them liberty; and that all the goods, chattels, and merchandizes of the aforesaid Archbishop, and his successors, and of all their men and tenants, as well, &c. in, of, or upon the lands, lordships, possessions, and fees aforesaid, although they should be tenants of the same King, or his heirs, or of any other persons whomsoever, should likewise, throughout the whole kingdom of England, be quit of all manner of pannage, passage, lastage, stallage, carriage, passage, terrage, trevage, [\* 224 n.] pontage, cheminage, anchorage and \* wharfage, and of suits to be made to shires and hundreds, and lasts of hundreds, to the same King and his heirs belonging; and also that they should have the goods and chattels of such tenants, residents and non-residents, and of other residents whomsoever, felons convicted, attainted or outlawed, or of any others whomsoever, condemned to die, as well at the suit of the King, as at the suit of the King and others, or at the suit of any others whomsoever; and also the goods and chattels of such tenants, residents and non-residents, and of other residents whomsoever, convicted and attainted, or outlawed for any contempts, trespasses, debts, accounts, or any other offences whatsoever, or for any other occasion or cause whatsoever, as well at the suit of the King, or his heirs, as at the suit of the King and others, or at the suit of a party; and all the goods and chattels forfeited of all the men and tenants of the aforesaid Archbishop, and his successors, as well entire tenants, residents and non-residents, and other residents whomsoever, in, of, or upon the lands, lordships, possessions, and fees of the aforesaid Archbishop,

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No. 7. — *Rex v. Capper*, 5 Price, 224 n., 225 n.

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and his successors, although they should be tenants of the lord the King, or his heirs, or of any other persons whomsoever, and of any felons of themselves whomsoever, and of all other felons, fugitives, or outlaws, so that if either of their men and tenants, as well entire tenants as not entire tenants, residents and non-residents, and other residents whomsoever, in, of, or upon the lands, lordships, possessions and fees of the aforesaid Archbishop, and his successors, for any felony whatsoever, ought to lose his life or member, or should fly, and would not abide judgment, or should be outlawed, or should commit any trespass, forfeiture, or thing whatsoever, whereby he ought to lose his chattels and lands in any Court whatsoever, where justice ought to be done on him, whether it should be before the King himself, or, &c. &c. : and also, that the aforesaid Archbishop, and his successors forever, should have the deodands, treasure-trove, wreck of the sea, and all the goods and chattels, called stolen goods, found or to be found with any person whomsoever, in, of, or upon the lands, lordships, possessions, and fees aforesaid, and by the same person, before any judge whatsoever avowed.

And that it should be lawful to them, \* their ministers [\* 225 n.] and servants, without any impediment of the said lord the King, or his heirs, and all other the officers and ministers aforesaid, and also of the sheriffs, escheators, coroners, mayors, bailiffs, and other ministers whomsoever of the said lord the King, and his heirs, to put themselves in possession of the goods and chattels aforesaid whatsoever, in all and singular the cases aforesaid, and other cases whatsoever, when the officers, bailiffs, or ministers of the said lord the King, or his heirs, might not, or ought not to seize the goods and chattels aforesaid, into the hands of the same lord the King, or into the hands of his heirs, if they should belong, or might belong, to the said King, or his heirs : and the same goods and chattels to the use and profit of the aforesaid Archbishop, and his successors, to receive and have forever, although the same goods and chattels shall have been first seized by the same King, or by the officers and ministers of him, and his heirs, on the occasions aforesaid, or either of them ; and that the aforesaid Archbishop, and his successors, should have, forever, the returns of the writs of the said lord the King, and of the precepts whatsoever of the same King, and his heirs, &c. &c. except in default of the said Archbishop, or his successors, or their ministers, in the lands, lordships, possessions, and fees aforesaid. And moreover, that the

aforesaid Archbishop, and his successors, forever, should have all manner of fines for trespasses, oppressions, extortions, deceits, conspiracies, concealments, regratings, forestallings, maintenances, ambidexters, falsities, and other misprisions and occasions whatsoever, and all fines for licence of agreement, and all amerciaments, ransoms, issues forfeited, and all fines adjudged and to be adjudged: and all forfeitures, as well by writs of attainr, or writs of *devies tantum*, or *premunire facias*, adjudged or to be adjudged, as by all other writs and mandates whatsoever, of all their men and tenants, as well entire tenants as not entire tenants, residents and non-residents, and other residents whatsoever, in, of, or upon the lands, lordships, possessions and fees aforesaid, as well before the said lord the King, and his heirs, as before, &c. &c. And also the escapes of felons of and in the lands, lordships, possessions, and [\* 226 n.] fees aforesaid, and all other things which to \* the said late King, or his heirs, might or ought to belong, as well of the said escapes of felons, as of murderers and felons, of all their men and tenants, as well entire tenants, &c. and of all other the ministers of the said late King, and his heirs aforesaid; and also all manner of fines and ransoms for any cause whatsoever arising, and the amerciaments whatsoever which then passed, or thereafter should pass, in demand of any town and hundred, in, of, or upon the lands, lordships, possessions, and fees aforesaid, although they should be tenants of the said late King, or his heirs, or any other persons whomsoever, in the Court of the said late King, and his heirs, &c. &c.: where the aforesaid men, and their tenants, as well entire tenants, &c. &c. in, of, or upon the lands, lordships, possessions, and fees of the aforesaid Archbishop, and his successors, although they should be tenants of the said King, or his heirs, or of any other persons whomsoever, should make ransom, or happen to be amerced, forfeit, issues, or to be condemned in escapes of felons, murders, or felonies; and which fines, amerciaments, ransoms, issues, escapes of felons, murders, and felonies, ought to have belonged to the said King, or his heirs, if the same had not been granted to the Archbishop aforesaid, and his successors. And that the said Archbishop, and his successors, should have, receive, levy, and collect by themselves, and their ministers, in form aforesaid, all such fines and ransoms, issues and amerciaments, and all the forfeitures, things, and profits aforesaid whatsoever, without the impeachment of the said lord the King, or his heirs, or his or their

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ministers whomsoever, although the same men and their tenants, as well entire tenants as not entire tenants, residents and non-residents, and all other residents, were tenants of the said King, or his heirs, or of any other persons whomsoever: although also the pledges or manucaptors of the said men, and their tenants, as well entire tenants, &c. or either of them, should hold of the said lord the King, or his heirs, or of any other person or persons elsewhere, or that they, or either of them, were not or was not resident or non-resident, in, of, or upon the lands, &c., aforesaid. . . .

And the same King granted to the said Archbishop, [228 n.] and his successors, that those his aforesaid letters to them thereof generally made, should be of the same force, virtue, and effect, as if all other the things above specified had been more especially, lawfully, and particularly expressed and specified in the same letters; and that they should be read, understood, adjudged, and determined on the part of the same Archbishop, and his successors, against the said King and his heirs, as better it might be known and understood, notwithstanding any omission, defect, negligence, repugnance, and contrariety in the same, or any act, ordinance, statute, or restriction to the contrary passed; or although, \* in the same letters patent, no express mention was made of the true yearly value of the liberties, franchises, acquittances, and immunities therein contained, or of any lands and tenements, or grants of liberties or acquittances to the said Archbishop, and his successors, or to any of his predecessors, by the same King, or any of his progenitors, theretofore made notwithstanding. Wherefore the same King willed and firmly commanded for him, and his heirs, that the aforesaid Archbishop, and his successors, Archbishops of the place aforesaid forever, should have all the liberties, franchises, and acquittances aforesaid, and the same and every of them should thereafter fully enjoy and use as aforesaid, without fine or fee, to the use of the said King, therefore in any wise howsoever to be made or paid.

By deed dated 12th November, 37 Hen. VIII., and subsequently confirmed by the Dean and Chapter, Thomas, then Archbishop of Canterbury, being in virtue of the said letters patent seized (*inter alia*) of the manor of Harrow, gave, granted and confirmed to the said Henry (VIII.), amongst others, the said manor of Harrow, with the appurtenances, \* to hold to the same [\* 230 n.] King, his heirs and successors forever.



King Henry VIII., by his letters patent under the great seal of England, bearing date at Hampton Court, the 5th day of January (*an. reg.* 37), for certain valuable considerations therein mentioned gave and granted to Sir Edward North, and the Lady Alice his wife (amongst others), all that his manor of Harrow, with all its rights, members, and appurtenances, late parcel of the lands, possessions, revenues, and hereditaments of the said Archbishopric of Canterbury; and also free warren, free chase, and free conduct of deer, and wild beasts; and all and singular messuages, mills, tofts, cottages, houses, edifices, lands, tenements, meadows, feedings, pastures, woods, underwoods, rents, reversions, services, courts leet, and views of frankpledge, and other rights, franchises, liberties, privileges, profits, commodities, possessions, hereditaments, and emoluments whatsoever, with all and singular their rights and appurtenances in Harrow, to the said Archbishop of Canterbury, or to the said Archbishopric of Canterbury formerly belonging and appertaining, or as being parcel of the

lands, tenements, possessions, and revenues of the same [\* 231 n.] Archbishopric of Canterbury thentofore \*had, acknowledged, accepted, used, or reputed, and which the same late King held to him, and his heirs and successors, forever, of the gift and grant of the said Archbishop: to have, hold, and enjoy the said manor (amongst others), and other the premises, with the appurtenances, to the aforesaid Sir Edward North, Knt. and the Lady Alice his wife, and the heirs and assigns of the said Edward, forever, to the only proper use and behoof of the said Edward, and the Lady Alice his wife, and the heirs and assigns of the said Edward forever: To hold of the same lord the King, his heirs and successors in chief, by the service of the twentieth part of a knight's fee, and rendering therefore yearly to the same late King Henry, his heirs and successors, of and for the aforesaid manor of Harrow, otherwise Sudbury, otherwise Harrow upon the Hill, and for Seymour Park, £11 1s. 6¼d. at the Court of Augmentation of the revenue of the Crown of the same lord the King, payable at the feast of St. Michael the archangel, every year for all rents, services, and demands whatsoever for the same, to the said King, his heirs and successors, in anywise howsoever to be rendered, paid, or done. And further, the same lord the King, of his certain knowledge and mere motion, did, for him, his heirs and successors by the aforesaid letters patent, grant to the aforesaid Sir Edward

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No. 7. — *Rex v. Capper*, 5 Price, 231 n., 232 n.

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North, Knt. and the Lady Alice his wife, and the heirs and assigns of the said Edward, that the same Edward, and Lady Alice his wife, and the heirs and assigns of the said Edward, should have, hold, and enjoy, and might and should be able to have, hold, and enjoy, within the aforesaid manor, messuages, lands, tenements, and all and singular other the premises, and within every part thereof, view of frankpledge and leet, and all things which to view of frankpledge and leet belong, free warrens, and all things which to free warren belong; and also goods and chattels waived, estrays, assay and assize of bread, wine and beer, and goods and chattels of felons and fugitives, and felons of themselves, and otherwise howsoever condemned, or put in exigent; and also so many, such, the same, the like, and such sort of courts leet, views of frankpledge, and all things which to court leet and view of frankpledge belong, or thereafter might or ought to belong, feasts, markets, tolls, customs, fairs, gersumes, fines, amerciaments, \* as- [\* 232 n.] size and assay of bread, wine and beer, free warrens, and all things which to free warren belong, goods and chattels waived, goods and chattels of felons and fugitives, felons of themselves, and others outlawed, or otherwise howsoever condemned or convicted, deodands, estrays, and other rights, jurisdictions, privileges, franchises, liberties, emoluments, commodities, profits, and hereditaments whatsoever, as and which the said Thomas, late Archbishop of Canterbury, or either or any of his predecessors, Archbishops of Canterbury, in right of the Archbishopric of Canterbury, or any other or others the said premises, or any part thereof, thentofore having, possessing, or being seised thereof, ever had, held, and enjoyed, in the manor and premises aforesaid, by reason or pretext of any charter of gift, grant, or confirmation, or of any letters patent by the said King, or either of his progenitors, to the aforesaid Archbishop, or to either of his predecessors, made, granted, or confirmed, or by reason of any lawful prescription, use, or custom, by the said Archbishop, or any of his predecessors, thentofore had or enjoyed. Then the defendants on that record derived title by mesne conveyances, from the persons claiming under the original grantee, alleging that they were thereby still possessed thereof, for the residue of the said term of sixty years, by right of accruer; and that so thereof being possessed, and the aforesaid Edward Palmer, and Alice his wife, so as aforesaid being seised of the reversion of the manor aforesaid, with the appurtenances, and of the

liberties, privileges, and franchises aforesaid, within the said manor, and by their attorney aforesaid, — prayed, that by the grace of the Court, all and singular the aforesaid fines, issues, and amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, commodities, and hereditaments whatsoever by them, in form aforesaid, claimed within the said manor of Harrow, otherwise Harrow upon the Hill, otherwise Sudbury, with the appurtenances, and the members of the same manor, according to the tenor of their aforesaid charter, they might be allowed to have, use, enjoy, and exercise within the manor aforesaid; and day being given till, &c. when the then Attorney-General confessed their claim, and the premises being seen by the Barons, mature deliberation between

them had, it was considered that the aforesaid Joseph [\* 233 n.] \* Herne, Thomas Davies, Edward Palmer, Esq. and

Alice his wife, had, within the manor of Harrow, all and singular the aforesaid fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, commodities, and hereditaments whatsoever, by them in form aforesaid claimed, according to the tenor of the charters aforesaid, to be used, enjoyed, and exercised, within the manor aforesaid, by pretext of the premises. Saving always the right of the lord the King, if, &c. *prout patet*, &c.

[240] Parke, for the demurrer, submitted that the real questions would be, 1st, whether the leasehold property of Bowler, situate *without* the manor, passed by the operation of the two grants taken together; and, 2dly, whether the stock and money in the funds, the property of the felon, passed by those grants, or either of them.

On the first question he contended that it having been admitted on the record that the defendants were entitled to the tenant's goods and chattels within the manor, it was admitted that a royal franchise passed by the letters patent to the grantee; for unless a liberty had been granted, they would have had no right to any thing.

[It was admitted that the leasehold property would pass under the words of the grant.]

He then insisted that the terms of the grants were general, large, and unconfined, and there was nothing expressed in them by which their construction could be so limited as the Crown were

obliged to contend it must be: that there could be no [\* 241] doubt that by the first grant of Edward IV. to the \* Arch-

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bishop everything personal which the tenant attained had, wherever situate locally, passed to the grantee. On that point he submitted there was to be found an authority which was precisely applicable, and went to establish the whole proposition: and that was *Lord Lumley's case*, Jenk. Rep. 6th Cent. Case 47; Vin. Abr. 134, — a case decided with more than ordinary solemnity; being said to have been resolved by all the Judges of England. The King (in that case) granted to the Earl of Arundel and his heirs “*ex gratiâ speciali certâ scientiâ & mero motu omnia bona & catalla felonum & felon' de se attinet' de proditiōe, de feloniâ, utlagatorum in exigendo positor', hominum suorum, integre tenentium, & non integre tenentium, residentium, & non residentium de et in omnibus maneriis & hereditamentis dicti comitis.*” The Earl was seised in fee of the hundred of Paling, in the County of Sussex. B. held a tenancy in fee within the said hundred of the said Earl, as of his person. B. was attainted of treason, committed by him in the County of Hereford, and had a lease for years, and goods within the said hundred of Paling, and elsewhere, where the Earl had not any hereditament. Resolved by all the Judges of England, that the Lord Lumley, who has the estate of the Earl of Arundel, shall by force of the said patent have the said tenancy, lease, and goods.

The case then proceeds: “The word ‘de’ shall be construed and relate to any tenure of the \* person, or of any [\* 242] manor of the Earl; the word ‘in’ relates to goods; the word ‘de’ to tenancies which are held of the Earl be the tenants resident or non-resident. This is a good precedent to construe *beneficium principis, quod deest esse mansurum.* The words in a patent *ex certâ scientiâ speciali gratiâ & mero motu*, make the case of the King like the case of the grant of one subject to another; if the King be not evidently deceived.”

That case goes the whole length of the proposition for which the defendants contend; and if it be an authority at all, is directly in point, at least as to the grant of Edward IV.

Then the question will be, whether that grant is not embodied, and the whole substance of it incorporated, in the grant of Henry VIII. to Sir Edward North. The latter grant adopts the former in the fullest and most ample terms, and by express and most comprehensive reference to it grants all the privileges, *liberties*, franchises, &c. &c., which the Archbishop had. Now the cases are numerous



which establish that words of express reference to a former charter, person, or thing, will pass the franchises which had been appendant to the subject-matter before its reunion to the Crown. This is the case of a liberty, — a royal franchise, — and therefore passes by words of reference. In *Whistler's case*, 10 Co. Rep. 65 b, it [\* 243] was held (citing *Darcie's case*), that “if a \* man has a manor to which an advowson is appendant, and franchise to have forfeitures and other franchises within the manor, and afterwards the manor comes to the King by forfeiture of war, and afterwards the King gives the manor to hold with the franchises which were always regardant to the said manor as such a one held, he shall have the franchises;” and there Sir WILLIAM HERLE said that it shall be a new grant; for the franchises (which lay in point of charter) were come to the Crown. And in the same case it is said to be observable thereon, “that if a manor, in which the owner have franchises which lie in point of charter, as forfeitures for treason, and other royal franchises, come to the King's hands, and he grants it again with the forfeitures of treason and other franchises which were regardant or appertaining to the said manor, as such a one held, all the franchises should pass, and that the words ‘regardant or appertaining to the manor’ shall be taken in that sense, although according to the strict propriety of the words such franchises could not be appertaining to the manor.” And the reason given is, that such construction as will make the true intention of the King expressed in his charter take effect is for the King's honour, and stands with the rules of law; and therefore this word “appertaining” shall in such case in the King's grant be taken out of the proper signification. The case then proceeds thus: 2. “It is to be observed, that in the same case such franchises as be in point of charter shall pass as by a new grant; *à fortiori*, [\* 244] franchises appendant or appertaining to a manor, \* as advowsons, &c. (which always continue *in esse*, and are never extinct in the Crown) shall pass. It is said in *Plow. Com.* in *Elgassa's case*, 12 b, if the King at this day grants over certain lands which have come to his hands before, and further grants to the grantee *tales libertates, privilegia, jurisdictiones, &c.* that he had who was last seised of the lands, where the King knows not the certainty of the liberties and privileges, yet the grant is good enough, and the patentee may inquire what *liberties* and privileges the other had before; and forasmuch as this incertainty may be re-

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duced to a certainty by inquiry or circumstance, the grant is good" (citing 9 Rep. f. 24 b). That case is noticed for the same point in Viner, Abr. tit. *Prerog. of the King* (I. b.) pl. 7 (L. b.) pl. 1, where also under the same title (pl. 1) it is said (citing Br. Abr. tit. *Extinction*, pl. 32, and Ib. *Incidents*, pl. 12),<sup>1</sup> if the King purchases a manor to which franchises real (royal) are regardant, and after gives the manor *simul cum libertat' ad illud spectant'* and does not say *simul cum libertat' ad illud spectant'* at the \* time [\* 245] that the manor was in the hands of the feoffor of the King, the franchises do not pass by this general grant, because the franchises of common right were annexed to the Crown. But (it is also said, pl. 2) otherwise it had been if special mention had been made "as is aforesaid" in the charter; and several other cases to that effect are noticed in the same book. The authorities therefore establish that point incontrovertibly; and the whole case is strengthened by the rule with respect to royal grants recognized in the books, that where the King grants by the words *ex certâ scientiâ & mero motu*, such patents shall be taken more strongly against the King, and in favour of the patentee. (Vin. Abr. tit. *Prerog.*, (E c) 3), where many authorities are cited in support of that position. These patents grant by those words; and therefore *ex vi termini*, many objections which might otherwise have been raised on the distinction to be taken between the grants of the Crown and those of the subject are entirely put out of this discussion.

Then (adverting more particularly to the terms of the grants, and observing that besides the very general nature of those terms, there were many things granted which were merely personal, — as to have fines, amerciaments, &c., of their tenants, that they should be exempt from tolls throughout England, &c. &c., — which could not be confined to locality), — it was insisted, that, on the whole, it was impossible to contend that the grantees were not entitled to the goods and chattels of \*attainted tenants of [\* 246] the manor, wherever they might be found, as well *without* the manor, *as within*.

<sup>1</sup> 'Thorpe dit, si le roy purchas maner' a q̄ franchises royals sont regardâts & puis done le mannor simul cū libertat' ad illud spectant', nul liberties passa, car p le purchas les franchises de cōmō droyt fuit annex' al coron', "cōt̄r sil dōe le maner cum libertat' ad illud spectant' tēpore quo maneriū fuit in manū us l' feoffor "

car ils fueront extincts devant, ut videtur & p ceux parolx ils passa cōe appēdants per luy. 43 Ass. p. 10.'

<sup>2</sup> *Incidents & appendants*, pl. 12.'

'Franches que fuē extinct' p purchase le roy pass' "p novel graunt come append."

On the 2d question — whether the money in the funds and stock belonging to the tenant passed by the grant — it was submitted, that the grantee was entitled to that species of property also under the words *bona & catalla felonum*, used in a grant of a *liberty*. It was urged that as there could be no doubt that the Crown would be entitled to such species of property, and that the grant of a *liberty* was a transfer of a complete right of sovereignty, such property must be held to have passed by this grant. In Com. Dig. tit. *Wife*, C. it is said, that “by grant of the *goods fugitivorum & felonum*, the grantee shall have the debts and specialties of fugitives, &c., as well as other goods, though there are no special words.” In 2 Rol. Abr. 195, (E) pl. 1, is the position, that — if the King grant certain *liberties*, and among other things *omnia bona & catalla felonum de se*, within such a place, it shall pass obligations, specialties, and debts, due to the felon: for though in other cases it would not, in the grant of a *liberty* it will. There can be no doubt that the stock would have belonged to the Crown: and if a particular grant had been made, which, after reciting Bowler’s conviction, had granted all his goods and chattels, his stock or money in the funds would have passed. Such property is in fact an annuity, and it is personal, and declared to be so by the 41st Geo. III. c. 3, s. 17. It is transferable by assignment.

Annuities were known to the common law. (Com. Dig. [\* 247] \* tit. *Annuity*.) And although funded property was certainly not known when these grants were made, yet the language of the grants is prospective: the words are “of all things which to the said late King, or his heirs, might or ought to belong.” Promissory notes, which are *choses in action*, and also of comparatively modern introduction, would have belonged to the Crown: and therefore they would pass to the grantee.

Richardson for the Crown, contended, that the defendants were not entitled to the goods and chattels of the felon not situated within the manor. If the grant of Edward IV. even to the Archbishop could be construed so largely, it would be productive of the utmost mischief and inconvenience, if it were not altogether impracticable. It would induce a continual clashing of claims between different lords, grantees of similar franchises in different manors, and between the Archbishop himself and his alienee of any of his lordships, before the Act restraining ecclesiastical persons from disposing of their possessions; and it would be impossible to say

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where one of the numerous manors of the Archbishop had been granted away by him, and a tenant of that manor had been attainted, being possessed of leasehold property both in the manor granted, and in others still belonging to the Archbishop, whether the property in the manor not granted belonged to the Archbishop or his grantee: and he submitted that on that ground alone it could hardly be conceived that the King had granted the franchise in so large \* a manner as the defendants con- [\* 248] strue it. Such a grant in those days would have occasioned a constant warfare between the different lords, if it were so to be construed, and in more modern times unceasing litigation, as the present claim sufficiently proves; and therefore it ought to be most satisfactorily shown to be the unavoidable construction of it before the Court would so extend it: whereas the construction put on it by the Crown was at once reasonable and practicable.

He then adverted to the various passages of the grant, which gave authority to the ministers and servants of the Archbishop to put themselves in possession of the goods and chattels, &c. &c. (Vide the grant, *ante, passim*) as showing that the franchise was intended to be confined to the possessions of the Archbishop, where alone his ministers and servants could have had jurisdiction.

He admitted that *Lord Lumley's case* was a strong authority, as far as it went; but he submitted, that there did not appear to have been any opposition made to the claim of Lord Lumley, and that it was decided without argument: and that there was also to be noticed a distinction in that case, the tenant holding the tenancy in fee of the Earl "as of his person."

He then insisted, that whatever might be the construction of the first grant, it was quite clear that the goods of felons without the manor did \* not pass to the grantee by the [\* 249] re-grant of Henry VIII., contending that there must be express words to revive a liberty, which has become reunited to the Crown, by a re-grant to a subject of the possessions to which it had been annexed; and for that he cited Com. Dig. tit. *Grant*, G. 7, where it is said that "words too general are not sufficient in the King's grant: as if *bona felon*", &c., which lie in grant and not in prescription, are reunited to the Crown or extinguished, and afterwards the King grants the manor *cum tota tota libertate privilegii*, &c., *qual' A. nuper abbas habuit*, who claimed the same privileges by



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charter, the grantee shall not have *bona felon* by such general words.' To the same point is the *Bishop of Coventry's case*, 2 Rol. 193, l. 40, and *Lord Lovelace's case*, Sir W. Jones' Rep. In *itin.* Windsor, 270, and in *itin.* de Waltham, 349. The rule is clear that the Crown is not bound by general words or words of reference, and that in all cases of royal grant express words are necessary to confer or revive a franchise.

[GRAHAM, Baron, mentioned the *Marquis of Downshire's case*, 5 Pri. 269, 19 R. R. 603, recently determined in this Court, as having so decided.]

If it should be said that there are express words in this grant, it should be observed that there is also an express limitation of them, confining the subject-matter to the manor of Harrow. The words "within the manor of Harrow" govern and qualify [\* 250] every one of the several objects of \* the grant, and the grant itself commences and concludes with those words. The Court is therefore relieved from the necessity of construing the grant in a manner so inconvenient and incongruous as the construction attempted to be put on it by the defendants would be, if indeed they could so construe it on the general tenor of the grant independently of the presence of those words.

He submitted therefore finally, that the defendants' construction was not the true and legal one, as applied to either of the grants; but that as applied to the grant of Henry VIII. the very terms of the letters patent exclude the possibility of such a construction, and are conclusive against it.

As to the question of the stock, he contended, that the general words of the letters patent were not sufficient to pass money in the funds, of whatever nature such sort of property might be deemed to be; and he submitted that it certainly was not personal property. Cases have established that the debts of a felon do not pass by general words: and particularly *The King v. Sutton*, 1 Wms.'s Saund. 275; *The Mayor of Southampton v. Richards*, 1 Sid. 142; *Ford and Sheldon's case*, 12 Co. Rep. 162 a; *The Queen v. The Archbishop of Canterbury*, 1 Leon. 202, which last was a case where the question was, whether a right to a presentment on an avoidance passed by a grant of goods and chattels of felons of themselves; and it seemed to be the prevailing opinion (for [\* 251] the case was not \* determined) that a title to present being a special chattel, did not pass by the general words "goods

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and chattels." He also cited an *Anonymous* case in Owen, Ow. Rep. 155; *Lord Northampton v. St. John*, 2 Leon. 56; and an *Anonymous* case in Ventr., 1 Vent. 32. Then advertng to the case cited for the defendant from 2 Rol. Abr. 195, he objected that that was not in point of decision; the report states merely that "so the Judges seemed to incline," and eventually they recommended a trial, the result of which is not known.

But it was chiefly urged, that in all events, as the money in the funds, be it annuity or what it may, was not locally situate within the manor of Harrow, it therefore did not pass. It has no locality; it is *bona notabilia*, and requires prerogative administration. It is difficult to define what species of property stock is. It was certainly made personal by Act of Parliament (41 Geo. III. c. 3) for purposes of enjoyment; but the intrinsic nature of the property was not nor could be altered by that statute: and in construing a grant of the date of these letters patent, that Act of Parliament cannot certainly be called in aid to extend its effect, by including a species of property not in existence at that time. In the case of *Wildman v. Wildman*, 9 Ves. 174, 7 R. R. 153, the MASTER OF THE ROLLS held, that stock was merely a right to recover a perpetual annuity, and that it was neither a chattel nor had any resemblance to a personal chattel. On the whole \* therefore he submitted, that that species of property did [\*252] not pass by the grant of goods and chattels of felons, or that if it did, as it was confined to goods, &c., within the manor of Harrow, stock, being not in fact locally situate anywhere, and certainly not within the manor, clearly did not pass by the words of the second grant.

Parke, in reply, submitted that whatever might be the inconvenience arising from any number of sub-grants made by the original grantee, no question of that sort occurred in the present case, and therefore no argument could be founded on it now. He insisted that the cases cited for the defendants were in point, and had not been answered; and as to the cases brought forward for the Crown, he relied on the distinction before taken of the present being a grant of a *liberty*.

He repeated that the money in the funds passed to the defendant under the words "goods and chattels," and submitted that the case from Siderfin, of *The Mayor of Southampton v. Richards*, on which *The King v. Sutton* seemed to have been founded, had in

fact decided nothing, nor had there been any decision in the case from Leonard, of *The Queen v. The Archbishop of Canterbury*. The present was therefore a case of first impression, and depended materially on the nature of such property, and whether it was capable of being included and granted under the words “goods” and “chattels.”

*Cur adv. vult.*

[\* 253] \* RICHARDS, Lord Chief Baron, now delivered judgment :

It being admitted by the confession of the *Attorney-General* in his replication, that the defendants were entitled to the residues of terms, goods, and chattels, situate and being locally *within* the manor of Harrow, of such of the tenants of the manor as should be attainted of felony, — the sole question is, whether they are also entitled to the residues of terms, and goods and chattels of such tenants, situate and being locally *without* the manor. That question will depend wholly on the legal construction of the two grants by which the franchise is said to have been conferred.

The first is a grant of Edward IV. of certain privileges, therein enumerated to the then Archbishop, to be enjoyed by him and his tenants *in, of, or upon* the lands, lordships, possessions, and fees of the said Archbishop.

[His Lordship, having read *verbatim* the granting part of those letters patent, as far as the conclusion of what relates to the franchise of having the goods and chattels of felons, observed :]

There is nothing said of the manor of Harrow by name in that grant, as distinguished from the other possessions of the

[\* 254] Archbishop, and it appears \* from the record (on which

I shall presently observe) that the Archbishops of that day possessed many other manors besides this of Harrow in different parts of England. The grant is a very general one, and is worded in a very general way, and certainly in its terms it is very indefinite and confused, and most inconvenient of construction.

In the 37th of Henry VIII. the then Archbishop granted this manor of Harrow to King Henry VIII. and there is no doubt that by that grant the King became seised of the manor *de jure coronæ*, as amply as if it had never been granted at all to a subject.

The King then (in the same year) granted it to Sir Edward North, and it will be extremely material in deciding this case to attend particularly to the precise terms of this last grant.

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[His Lordship read the words, as in the *habendum*, p. 210, *ante*.] He granted therefore, as we see, all this manor of Harrow, with all and singular its rights and appurtenances *in* Harrow expressly and emphatically, to the said Archbishop of Canterbury formerly belonging. Nothing is here, as yet, said about the goods of felons, and whatever is given is stated to be *in Harrow*. Then the grant thus proceeds: “And further the same lord the King of his certain knowledge and mere motion did grant to the aforesaid Sir Edward North and the Lady Alice his wife, that they should have, hold, \* and enjoy, *within* the afore- [\* 255] said manor, messuages, &c. and all and singular other the premises, and *within* every part thereof, view of frankpledge and leet, and all things which to view of frankpledge and leet belong, free warrens, &c. &c.; and goods and chattels of felons and fugitives, and felons of themselves, outlawed or otherwise, and others howsoever condemned, or convicted, deadlands, estrays, and other rights, jurisdictions, privileges, franchises, liberties, &c. as or which the said Thomas, late Archbishop of Canterbury, or either or any of his predecessors, in right of the archbishopric, ever had, held, and enjoyed *in* the manor and premises aforesaid, by reason or pretext of any charter of gift, &c.” That is the language of this second grant to Sir Edward North. The defendants in their plea deduce their title from that grantee. Now the first question is, whether under that second grant the leasehold property of tenants of the manor, *not locally situate within the manor*, passed from the Crown to the grantee; for the Attorney-General has very properly confessed the defendant’s claim, as to those parts which are locally situate *within* the manor.

Now I very much question whether the leasehold premises of the tenants of the Archbishop, situate *out of* the manor, would have passed even by the terms of the first grant of Edward IV. to the Archbishop, large and extensive as they are said to be; yet certainly, as applied to this question, those letters patent are very difficult of \* interpretation. But a fact is put on [\* 256] the record by the replication of the Attorney-General, which will much assist us in ascertaining the true construction of these instruments. It is, that “the Archbishops of Canterbury before and at the time of making the letters patent of Edward IV. and from thence till the time of the grant from the then Archbishop to King Henry VIII. were seised in their demesne as of



fee, in right of the Archbishopric, as well of and in the said manor of Harrow, as of and in divers other lordships and manors in divers parts of England, wherein were divers men and tenants of the archbishops, as well residents as non-residents," and that fact may serve to account for the otherwise apparently extraordinary terms of the grant, on which the defendants put so extensive a construction; and under which they insist that every thing which belonged to every tenant of the manor, in any place, and wherever situate, became forfeited on attainder, to the Archbishop. Now certainly that would be a most inconvenient construction, and would be productive of much mischief if it were to be supposed that the King should make such a grant to any person who was possessed of other manors, without confining it to the possessions of the grantee; for each of those manors might be aliened to other different persons as the manor of Harrow was to the King, and in that case each individual alienee would have claims so incompatible as to render the grant altogether absurd in effect, and impracticable

of enjoyment, if it were necessarily to be construed as the [\* 257] \*defendants contend, *reddendo singula singulis*, whereas there might be somewhat more of consistency in such a grant, if taken to be personally confined to the proprietor of many manors, giving him such a right commensurate in extent with his other *possessions*. In any other point of view the construction now attempted to be set up would so abound with inconveniences and inconsistencies, that unless we should be absolutely driven to adopt it, it ought to be at once rejected.

In such a case therefore the *onus* is on the defendants. Now they profess to sustain that *onus* by an authority, which they insist is decisively in their favour. I have been favoured with a copy of the record, but I think I may fairly state it from the book in which it is reported: that is *Lord Lumley's case*.

[His Lordship read the case.]

Now it does not strike me, that that case is exactly in point here, even as applicable to the first grant, so as to establish the defendants' position; for the words, and the form of the grant in *Lord Lumley's case*, are not precisely the same as in these [\* 258] letters patent.<sup>1</sup> But with respect to its being \*conclusive

<sup>1</sup> It may be useful to make one short observation, as to the distinction in the language. In the case cited, the words are "be & in." In this grant the words are "is, of, or upon," the one making the more comprehensive and personal prepo-

or applicable to that proposition as to the second grant, I think it is quite clear that it has no application whatever to that, and therefore we need not discuss its bearing on the first letters patent.

There can be no doubt that Henry VIII. took the manor as fully as the King had it before the original grants. The cases are numerous which establish that; but I shall content myself with only stating one or two. In the case of *The Abbot of Strata Marcella*, 9 Co. Rep. 25 b., it is said, "when the King grants any privileges, liberties, franchises, &c., which were such in his own hands as parcel of the flowers of the Crown, as *bona & catalla felonum*, &c. within such possessions: if they come again to the King, they are merged in the Crown, and he has them again *in jure coronæ*." That position is maintained in Comyn's Digest (tit. *Franchises*, G. I.) where authorities are collected which establish that franchises appendant to a manor or other possessions become extinct by their re-union to the Crown, and the King is then again seised of them *in jure coronæ*.

That being so, the rule is, that where liberties are extinct, they cannot be created *de novo* by \*general words. [\* 259] There are one or two strong decisions to that effect in Viner; and I have looked into the cases themselves, and find them perfectly correct. The first is in tit. "*Prerogative of the King*," (A. c.) "The Dean and Chapter of P. being seised of certain manors, to which the King annexed by grant that they should be discharged of purveyors. They surrendered the manors to the King. The King afterwards granted them to others, with the same liberties and privileges as the Dean and Chapter had. In that case, in as much as the ancient liberties were extinct, by being sunk into the Crown, such general grant did not create *de novo* the liberties which the Dean and Chapter had before." In another case, in the same book, tit. *Prerogative* (A. c.) 2. "The Bishop of Coventry had a liberty *de catallis felonum* within his manor of B., and the manor having come to the King by attainder, he granted it over with *tot tales tantas & quales libertates*, as the Bishop or his predecessors had: yet it was held, that the grantee

sition "de" the leading term, and uniting it with the more limited and local one "in," by conjunction (purporting addition) — the other giving the commanding position to "in," and employing the disjunctive,

making "of" rather synonymous with "upon," than distinct from "in" and "upon," as if intended to be used merely to explain and not to add to the leading term.

should not have by that grant the said liberties which the Bishop had; for when they are once extinct, words of revivor will not be sufficient; but there ought to be words of grant: and such general grant will not be sufficient.” In *Lord Paget's case*, also, cited in *Lord Darcy's case*, Cro. Eliz. 513, it was held, that general words are not sufficient in the King's grant. Thus, where a grant was of *bona & catalla felonum* in a particular forest by H. VI. [\*260] to J. S. Afterwards, by a private statute, \*all liberties granted by him were resumed. The forest came to the King by attainder, and it was again granted over with all the liberties which J. S. had therein with a *non obstante aliquo statuto*; yet it was held, that the grantee should not have *bona felonum* by such general words: and there are many other cases to the same effect. I will only add that of *The King v. Sutton*, 1 Saund. 273, where, on a grant of *bona & catalla felonum*, it was held, that the goods and chattels of felons of themselves do not pass.

[His Lordship again adverted particularly to the terms of the grant of Henry VIII.] It is admitted that by this grant the goods and chattels of felons, situated *within* the manor, passed; but the defendants claim all the tenants' goods, &c. wherever situate. Now that as I have said would be a most inconvenient grant if it were to be so construed; but I consider that it is impossible to give so extensive a construction to that grant, even if it were not a grant of the Crown, but of a private individual; for by the grant of a private person, of the goods and chattels of felons *within* a place, the goods and chattels of felons out of that place would clearly not pass. I, however, by no means intend to admit, by so saying, that the grants of the Crown are to be construed as those of private persons are; for they are not governed by the same principles. It has been urged, that the words *ex mero motu & certâ scientiâ*, vide *Sawyer v. East*, Lane Rep. 111, reduce a royal grant [\*261] to the \*same standard of construction as the grant of a subject, and bring it within the principle that it is to be taken strongly against the grantor, and certainly those words are here. I am however not of that opinion, and although cases to that effect may be found, yet they will not bear minute investigation, when the principles on which they proceed are examined. Then, when it is contended, that the words of reference to the former grant carry it further, the cases which I have already adverted to furnish the answer to that proposition.

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Thus the defendants having no claim on principle, and there being many authorities against them, we are to inquire if there be any case which favours the doctrine on which they rely. I consider the only authority cited for them which even appears to incline towards it (*Lord Lumley's case*), as by no means in point, or applicable; for the words in that grant are *bona (&c.) tenentium (&c.) de & in omnibus maneriis, &c. dicti comitis*, so that that grant is extended expressly to tenants holding of the manor, as well as tenants *within* the manor; whereas in this second grant there is a total absence of "*de*," and a constant presence of the preposition "*in*." The words *within* the manor are on each occasion repeated as if with care, at the commencement, throughout, and at the end. That case being therefore out of the way, there is no authority for the arguments which have been used on behalf of the defendants' \* claim, and there must accordingly be judgment [\* 262] for the Crown on that part of the case.

The next question is as to the stock and the dividends. Now it is certainly not easy to define precisely the meaning of "stock." It is not an ancient subject of property, nor known to the common law. It is however a hereditament.<sup>1</sup> It is an annuity, and treated as such by Act of Parliament, and it is made personal estate by statute. But whatever it may be after our decision on the other part of the case, the only question regarding it now is where such estate is to be considered as locally situate. It does not lie within the manor of Harrow clearly, nor is there any precise defined locality ascribable to it. For some purposes however it has a locality, as certain specialties have. One of those purposes is that of probate and administration, for giving effect to which it is supposed to lie within the Archbishopric of Canterbury. Now Harrow is not within that Archbishopric. It cannot therefore in any sense be said to lie within the manor of Harrow, even if it have a fixed locality; and if it have not, *cadit questio*, for nothing is granted that is not within the manor of Harrow.

The case of *Wildman v. Wildman*, 9 Ves. 177, 7 R. R. 153, which was decided by the then MASTER OF THE ROLLS, whose accu-

<sup>1</sup> This expression seems to require some limitation of meaning. Grants of annuities to one and his heirs charged upon the public revenue at home or in the colonies, have been held not to be within the Statute of Frauds or the statute *de*

*Donis · Earl of Stafford v. Buckley* (1750) 1 Ves. Sen. 170, and, although descending to the heirs, to be personal and not real estate. *Radburn v. Jervis* (1840), 3 Beav. 450. R. C.



No. 7. — *Rex v. Capper*, 5 Price, 263, 264.

[\* 263] racy we all well know, is applicable to this \* point. The question there was, whether stock which a wife had become entitled to as next of kin to an intestate in the lifetime of her husband, part of which she had transferred with his consent, belonged to her after his death. She had received the dividends whilst he was living. The MASTER OF THE ROLLS was of opinion that it did belong to her by survivorship. We know that a chair or a horse would not, but that a debt or a legacy would. On that occasion his Honor said, "The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption, — a mere right therefore: the circumstance that Government is the debtor [so that he considered it a debt] can make no difference, — a mere demand of the dividends as they become due having no resemblance to a chattel movable, or coined money, capable of possession and manual apprehension." Thus he seems to have thought, and I apprehend correctly; that such a chattel as is capable of reduction into possession by a husband, so as to give it to him, must be such as may be possessed by manual occupation. And on that ground he decided, that a transfer of stock to the wife was not a reducing into possession by the husband, so as to destroy its legal incident of surviving to the wife.

Then it has been held, that the words *bona & catalla* in a royal grant will not pass the debts of a felon. The authorities for that are *Ford* and *Sheldon's case*, 12 Co. Rep. 1, 2 and *The King* [\* 264] *v. Sutton*, 1 Saund. 273. In \* the first of those cases it is laid down that a grant of such things extends only to goods in possession, and not to things in action. Now stock cannot be called a thing in possession; it is a thing in action.

There is also another case which is very strong on the same point, because it goes to show that the words "goods and chattels" will not carry a debt as being a *chase in action* even in a will, where there are not other words plainly importing an intention that they should pass; for I by no means say that it would not pass *choses in action* in a will in any case. We are now however upon the construction of legal instruments which require great care, notwithstanding any liberality which the words *ex certâ scientiâ & mera motu* may be supposed to admit of. The case I allude to is that of *Chapman v. Hart*, 1 Ves. Sen. 271, which was a bequest of all the testator's goods and chattels in his house, and on board the *Warwick*. On that Lord HARDWICKE said, "Undoubtedly no

No. 7. — *Rex v. Capper*, 5 Price, 264–266.

goods and chattels in the house can pass but such as were properly in possession, not *choses in action*, except bank notes, which the Court considers as cash; for those words may certainly extend further than to bare furniture, and if any ready money were in the house (if not an extraordinary sum, and just received) that would pass. In the *Countess of Aylesbury's case*, I was of opinion, that by a devise of all things in a house, money and bank

\* notes passed to the testator's wife, and that the testator [\* 265] meant to consider the notes as cash; but bonds do not pass, not admitting of a locality, except as to the probate of wills, &c. I think there is a difference between a legacy of goods on board a ship, and in a house," and so on. So that Lord HARDWICKE was of opinion, that the words "goods and chattels" would not pass *choses in action*.

There is also a case in Br. C. C. of *Moore v. Moore*, 1 Br. C. C. 127, where Lord THURLOW held the same doctrine, and recognized the case of *Chapman v. Hart*. The question was, whether a bond found in a drawer in a house in Suffolk passed under a bequest of "all my goods and chattels in Suffolk," and whether the word *bona* would pass bonds and credits; and his Lordship said, "*Choses in action* have no locality. Bonds have no more locality than other *choses in action*, otherwise than by drawing the jurisdiction of the Ecclesiastical Court, and the judgment in that case (*Chapman v. Hart*) must prevail. In this case also it has weight that the house was given to the same person. Removal of goods for a necessary purpose is not an ademption of a specific legacy. But would you follow bonds and judgments in the same manner? It would be too much to argue it in that way. The authority of that case must go so far as to include bonds with other *choses in action* as to their want of locality."

\* It is thus settled that a bond and stock have no locality [\* 266] any more than other *choses in action*, except for the purpose of probate and administration; and therefore as the words here are *bona & catalla felonum* they do not pass stock, which I consider is a *chose in action*, or in the nature of a *chose in action*. It is not a thing tangible of which you can take corporal possession, and therefore, without having recourse to the distinction founded on the words "in" and "within," as not passing any thing which is locally situate without the manor, stock, as a *chose in action*, does not pass by this grant as *bonum aut catallum*, and therefore it is impossible to refuse our judgment to the Crown.

No. 7. — *Rex v. Capper*, 5 Price, 266, 267.

I am desirous of repeating such of the reasons which I have given as are founded on the fact stated in the replication, that the Archbishop was seised at the time of these various grants of many other manors; for in case of his alienation of any or all of them singly to different persons, as he might have done, the absurdity and impracticability, which would ensue from adopting the construction contended for by the defendants, would be infinite and monstrous. Independently of that however, we are of opinion that judgment should be given for the Crown. That is the opinion of the Court, at least with the exception of my brother GARROW, who has abstained, from motives of delicacy,<sup>1</sup> from expressing any [\*267] opinion; but my \*brothers GRAHAM and WOOD concur fully in the judgment which I have delivered. The reasons which I have given are my own, and for those I am alone responsible.

*We therefore give judgment for the Crown.*

*Note by the reporter (Price).*

It appears by the following case, which is in Lane, 90, and the cases there cited *arguendo*, that the question of the locality of a *chose in action* of an outlaw on a similar claim, in virtue of a royal franchise, was made in this Court in the reign of James.

BROMLEY'S CASE, Hil. 8 Jac.

Hutton, Serj., came to the bar, and showed that one Bromley had before this time made a lease for years, in the county palatine of Durham, of certain coal mines in that county, rendering rent £100 per annum, which rent is arrear for divers years, and that Bromley became outlawed here in the Common Pleas for debt, at the suit of Cullamour, a merchant; and that the King had granted this debt, due upon this lease for years, as forfeited for outlawry unto him. And Hutton, for the Bishop, said, that it belongs to him, because he had all the goods of men outlawed within his county; and if this debt belongs to the King or Bishop, it was the doubt, the party being outlawed in the county of Northumberland, which is out of the county palatine of Durham.

TANFIELD, Chief Baron, said, that the debt shall follow the person; and he said that in 21 Eliz., *Vere and Jefferies' case*.

<sup>1</sup> Having been Attorney-General when the proceeding was instituted.

No. 7. — *Rex v. Capper*, 5 Price, 268. — Notes.

\* it was a question if debt upon a bond shall be forfeited to him who had such a privilege where the bond is; and he said that in this case it was resolved that he shall have the bond and debt (who had *bonda attagatorum*) where the bond is: and so it was resolved, as he said, in a case referred out of the realm of Ireland; but here is a debt which accrueeth by reason of a real contract of goods in the county palatine, and he who is debtor is the party outlawed, but not in the county palatine of Durham.

And Hutton, Serj., said that he had the roll of a case in this Court in the time of Edw. III. that the Bishop of Durham was allowed a debt in a more strong case than this is; for there a creditor was outlawed in London, and his bond was also in London, and the creditor was only an inhabitant within the county palatine, yet the Bishop was allowed this debt.

CURIA: —

Put in your claim, and we will allow that which is reasonable, and it was adjourned.

## ENGLISH NOTES.

The subject-matter of this rule has already been briefly dealt with in *Sir Walter Hungerford's Case* (1585), No. 7 of "Ambiguity," and notes, 2 R. C. 763, 764.

A grant from the Crown, which might have been bad originally, may be held good upon the presumption of a confirmatory grant, if coupled with long possession or enjoyment. *Des Barres v. Shey* (P. C. 1873), 29 L. T. 592, 22 W. R. 273. In *Bailiffs, &c. of Tewkesbury v. Bricknell*, (1809), No. 3 of "Corporation," 7 R. C. 260, 22 Taunt. 120, 11 R. R. 537, it was held that an ancient charter might be expounded by contemporaneous usage. *Communis error facit jus*.

As examples of the rule may be cited *Attorney General v. Marquis of Downshire* (1816), 5 Price, 269, 19 R. R. 693; *Wooley v. Attorney General of Victoria* (P. C. 1877), 2 App. Cas. 163, 46 L. J. P. C. 18, 36 L. T. 121, 35 W. R. 852, *Attorney General of British Columbia v. Attorney General of Canada*, (P. C. 1889) 14 App. Cas. 295, 58 L. J. P. C. 88, 60 L. T. 712.

The Lord Chancellor should take care that the King is not deceived in his grant; and it is for the party applying for a Crown grant to make out a case for the grant, and not merely to answer any objections that may be urged against his application. *Ex parte O'Reilly* (1790), 1 Ves. Jr. 112, 1 R. R. 89.



No. 7. — *Rex v. Capper.* — Notes.

The grantee from the Crown may have powers conferred upon him, which are properly part of the Crown prerogative. Thus, it has been held that the grantee of fee farm rents from the Crown might distrain upon land of the tenant which was not subject to the rent. *Attorney General v. Mayor of Coventry* (1715), 1 P. Wms. 306, 2 Vern. 713.

The Crown may impose conditions which would be void in the case of a grant or conveyance from the subject. Of this a notable example is furnished by the grants made by Charles II. of annuities charged upon the public revenue. Thus, a grant of an annuity to one and his heirs out of the Barbados duties was held not to be a rent, or realty, or within the Statute of Frauds, or the Statute *de Donis*. Accordingly a settlement of such an annuity upon one and the heirs of her body was held to create a fee simple conditional. *Earl of Stafford v. Buckley* (1750), 1 Ves. Sen. 170. Although the heir takes such an annuity by descent as against the personal representative, he takes it as personal estate. *Radburn v. Ferris* (1841), 3 Beav. 450. Where, however, the profits are derived from things savouring of realty, as a grant of lighthouse tolls, it may be realty. *Attorney General v. Jones* (1849), 1 Mac. & G. 574. In that case, however, the title depended on an Act of Parliament. Again, the Crown may make a grant, absolute in terms, but only conferring a restricted power of alienation. *Davis v. Duke of Marlborough* (1818), 1 Swanst. 74; *Rarema Chitty v. Sultan Allie Iskander Shah* (P. C. 1883), 8 App. Cas. 751.

The case of *Kinloch v. Secretary of State for India* (H. L. 1882), 7 App. Cas. 619, 51 L. J. Ch. 885, 47 L. T. 133, 30 W. R. 845, should not be omitted from consideration, although the case is somewhat special in its circumstances. The point upon which the decision turned was whether a trust had been created for the benefit of persons who had been present at certain military operations. The House of Lords held, affirming the decision of the Court of Appeal, that the claimant was not entitled to succeed, as the Crown had not parted with the right to control the application of the fund.

## AMERICAN NOTES.

The doctrine of the Rule is supported by *Wilcoxon v. McGhee*, 12 Illinois, 351; 51 Am. Dec. 409, holding that a grant of land by the Government does not carry the right to overflow adjoining land of the Government by a dam on the granted lands, although the dam was on the land at the time of the grant. The Court said: "Grants by the Government are construed favourably for the grantor, and pass nothing by implication." Citing *United States v. Arredondo*, 6 Peters (U. S. Sup. Ct.), 738; *Charles River Bridge v. Warren Bridge*, 11 ibid. 545. In the latter case, Chief Justice TANEY observed: "Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for

No. 7. — *Rex v. Capper.* — Notes.

the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and by implication make the terms of a charter in one of the States more unfavourable to the public, than upon an Act of Parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favour of corporations, while we adopt and adhere to the rules of construction known to the English common law in every other case without exception? We think not; and it would present a singular spectacle, if while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavourably to the public, and to the rights of the community, than would be done in a like case in an English court of justice." See *Middleton v. Pritchard*, 3 Scammon (Illinois), 519; 38 Am. Dec. 112, in which it was held that "we must construe the grant most favourably for the grantee, and that it intended all that might pass by it."

Mr. Washburn (3 Real Property, p. 190), says: "In all questions of construction arising under grants between the government and the citizen, a different rule prevails, in one respect, from that adopted in questions between individuals. Between the latter, the construction, if doubtful, is always to be in favour of the grantee, and against the grantor; whereas in the case of the government, the construction is always against the grantee, and in favour of the government." Citing *Hagan v. Campbell*, 8 Porter (Alabama), 9; *Townsend v. Brown*, 4 Zabriskie (New Jersey Law), 80; *Mayor, &c. v. Ohio &c. R. Co.*, 26 Pennsylvania State, 355; *Green's Estate*, 4 Maryland Chancery Dec. 349; *Dubuque, etc. R. v. Litchfield*, 23 Howard (U. S. Sup. Ct.), 88. These cases establish the rule that "Nothing is to be taken by implication against the public except what necessarily flows from the nature and terms of the grant."

In the interesting and important case of *De Lancey v. Piepgas*, 138 New York, 26, it is said: "The grant is to be applied with strictness where it is the gift of some prerogative right to be held by the citizen as a franchise, and which becomes private property in his hands. It will not be presumed that the sovereign power intended to part with any of its prerogatives, or with any portion of the public domain, unless clear and express words are used to denote the intention. But colonial charters were designed to be the instruments upon which the institutions of a great political community were to be founded: and their provisions must be liberally interpreted, whenever necessary to accomplish the purpose of their creation." "The different rule of construction to be applied in the two cases is defined with great clearness and emphasis by Chief Justice TANNEY." Citing *Martin v. Waddell*, 16 Peters

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(U. S. Supr. Ct.), 367. In the latter case the Chief Justice observed: "The dominion and property in navigable waters, and in the lands under them, being held by the King as a public trust, the grant of an individual of an exclusive fishery in any portion of it is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant still remains in the Crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly, and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it." But in regard to the patent to the Duke of York it was held otherwise; all rights passed except those reserved, and "there is no room therefore for the application of the rule above mentioned."

In *Mayor v. Ohio, &c. R. Co.*, *supra*, it was held that a legislative grant of land, fifty feet wide, for a railway, does not imply the right to erect buildings thereon, nor to keep cars standing thereon except to load and unload.

"The construction of a gratuitous grant by the State must be restricted to its obvious and plain intent. The grant of a donation flowing from the bounty of the Government must be construed most favourably for the Government." *Green's Estate*, *supra*.

In *Hagan v. Campbell*, *supra*, a grant to an individual, from the British Government, of land bounded on tide-water, was held limited to ordinary high-water mark. The Court said: "Public grants are made by a trustee for the public, and no alienation should be presumed which was not clearly expressed."

"All grants of this description are construed strictly *against* the grantees; nothing passes but what is conveyed in clear and explicit language." *Dubique, &c. R. Co. v. Litchfield*, *supra*, citing *Gildart v. Gladstone*, 1 East, 675.

In *Townsend v. Brown*, *supra*, a grant of land on tide-water was held not to pass the right of oyster fishing below low-water mark. "The rule is founded in wisdom. All experience teaches that public rights are yielded to public interests with sufficient alacrity. If the Legislature really design to grant to individuals the right of several fishery below low-water mark, it is easy to do so in plain and express terms."

This doctrine does not apply to grants for a valuable consideration. 3 Washburn on Real Property, p. 190. "And the rule may be stated as a general one, in respect to legislative grants in this country, that such grants should be construed liberally in favour of the grantee, and in such a manner as to give them a full and liberal operation, so as to carry out the legislative intent, where that can be ascertained." *Ibid.*, citing *Hyman v. Reed*, 13 California, 444; *Commonwealth v. Roxbury*, 9 Gray (Mass.), 492; *Martin v. Waddell*, 16 Peters (U. S. Sup. Ct.), 411.

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No. 8. — In re Tufnell, 3 Ch. D. 164. — Rule.

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SECTION III. — *Crown Appointments.*

No. 8. — IN RE TUFNELL.

(CH. D. 1876.)

No. 9. — GRANT *v.* SECRETARY OF STATE FOR  
INDIA IN COUNCIL.

(C. P. D. 1877.)

## RULE.

A SERVANT of the Crown holds his office during pleasure, and his dismissal gives no right of action against the Crown, whatever may have been the terms upon which he was originally appointed. The only exceptions are statutory, under the enactments relating to judicial offices.

In the case of English settlements, where the Crown has delegated its Sovereign powers, a similar rule is applicable.

*In re Tufnell.*

3 Ch. D. 164-177 (s. c. 45 L. J. Ch. 731, 34 L. T. 838, 24 W. R. 915).

*Crown Appointment. — Terms of Service. — Dismissal.*

Every officer in Her Majesty's army holds his office subject to the will [164] of the Crown, and is liable to be dismissed at any moment without cause assigned; and there is no such thing as a military appointment permanent in the sense of being tenable for life, or until the holder is disqualified by misconduct or incapacity from fulfilling the duties attached to it. Therefore where a medical officer in the army was, at his request, and on condition of waiving his right to promotion, appointed to the permanent medical charge of the military prison at Dublin:

*Held*, 1, that as a military officer he was subject to the rules and regulations of the service, and the Court had no jurisdiction on a petition of right or any other proceeding to inquire into the circumstances under which he ceased to hold the office; 2, that the office, like all others in the army, was only tenable *durante bene placito*.

Demurrer.

This was a petition of right by Thomas Jolliffe Tufnell, who now held the rank of surgeon-major in Her Majesty's army.



The petition stated that the suppliant entered Her Majesty's army on the 11th of June, 1841, and in the month of April, 1846, he was stationed at Dublin as assistant-surgeon on the staff, and was in charge of the then existing provost prison.

Shortly afterwards the new district military prison at Dublin was completed, and with a view to obtaining the permanent medical appointment to the prison, he put himself in communication with the then Secretary at War, who was the person to make a permanent medical appointment, and with that view, on the 5th of October, 1846, wrote and sent to Captain Dillon, the Superintendent of Military Prisons in Ireland, a letter, which was in substance as follows:—

"With reference to my application for permanent appointment to the military provost prison, I have the honour to inform you that with a view of obviating any difficulty that may arise in naming me to permanent employ, that should the Right [\*165] \*Honourable the Secretary at War and the Director-General of the Army Medical Department be pleased to confirm my present employment in Dublin, I have no objection to forego all further claims to promotion, regarding a permanent appointment as equivalent to increased rank."

He received in answer the following from the Under Secretary at War:—

"WAR OFFICE, 31 Oct., 1846.

"Sir, — I am directed to acknowledge the receipt of your letter of the 5th instant, transmitted by the Superintendent of Military Prisons in Ireland, and to acquaint you that, under the circumstances represented by the military authorities at Dublin, the Secretary at War, as a special case, will not object to your taking permanent charge of the military prison at Dublin, on the understanding that you are to continue to perform the same duties as heretofore to the troops at Dublin, and that you also forego all future claim to promotion as a medical officer of the army.

"I am, Sir,

"Your very obedient servant,

"L. SULIVAN.

"Assistant-Surgeon Tufnell, Military Prison, Dublin."

Mr. Tufnell accepted the terms mentioned in this letter, and on the same day entered upon the duties of medical officer, which he

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continued to discharge till the 8th of December, 1874, when he was compulsorily retired on half-pay. He was then in the 56th year of his age, and was then and now competent and able to perform the duties attached to the permanent medical charge of the military prison at Dublin, and was then and still was willing to perform them; and he submitted that under the letter of the 31st of October, 1846, he was appointed to the medical charge of the military prison at Dublin during his life, or until incapacitated by infirmity or misconduct.

The petition then detailed the circumstances relating to the suppliant's appointment to the office of Regius Professor of Military Surgery at Dublin, to which he was appointed in August, 1855, with a salary of £100 a year, and the privilege of charging a fee \* of £3 3s. to each student not in the service. [\* 166] From this office he derived an income of £250 per annum.

This office was afterwards abolished upon the concentration of the military medical schools at Chatham, and by way of compensation for its loss he received the rank of surgeon-supernumerary to the establishment, and by warrant of the 11th of June, 1861, he was advanced to the rank of surgeon-major.

Mr. Tufnell submitted that this promotion was as supernumerary to the establishment, and as such, a special appointment; and though different in kind from, yet was equal in duration with, the appointment for which it was substituted, and was therefore tenable by him for life, or whilst capable of performing the duties.

The retirement on half-pay was made after notice to him from the Commander-in-Chief.

The petition stated further that between March, 1867, and December, 1874, at least twenty-three medical officers junior to Mr. Tufnell were promoted over his head to the grade or rank of deputy-inspector-general, and it was submitted that the only ground upon which he had been passed over (except in the case of promotion for special services) was that he held a special appointment which was permanent and supernumerary.

The prayer was, that Her Majesty might do what was just and right, and cause the suppliant to be compensated and indemnified for the loss, damage, or injury sustained by him; and for further relief.

It was not stated in the petition, and it did not appear, that any emoluments were attached to the office beyond the pay belonging

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to the rank of the officer holding it. But it was stated in the course of the arguments that in 1846, when the appointment was made, Mr. Tufnell was to receive 15s. a day; that just before he was put on half-pay his emoluments were £680, and his half-pay £365.

The Attorney-General demurred.

Rigby, in support of the demurrer:—

This is a demurrer under the Act of 23 & 24 Vict. c. 36, commonly known as Sir William Bovill's Act, under which a petition of right follows the same course as any other action or suit.

[\* 167] \* The first ground of demurrer is that this is an attempt to bring within the cognizance of Courts of law the relation between Her Majesty and the officers of Her Majesty's army. The Court has no jurisdiction to entertain any question arising as to the pay or half-pay of any officer in the army. Every military officer holds his office at the will and pleasure of the Crown in the strict sense of the word, and there is no contract as between an officer and the Crown to hold office for life. It goes some way to support this view that no case has as yet arisen in which such a claim as the present has been made by any military officer.

The allegations amount, in substance, to stating that an appointment to a permanent office means an appointment for life. Now it is perfectly clear that, under the provisions of the Mutiny Act passed annually, Her Majesty has no power to keep up a standing army or employ a single officer for more than a year, or enter into any such arrangement as that explained in the submissions in this petition.

The Mutiny Act commences with this recital: "Whereas the raising or keeping a standing army within the United Kingdom of Great Britain and Ireland, in time of peace, unless it be with the consent of Parliament, is against law;" and by sect. 2 of the Mutiny Act of 1875 it is made to apply to all persons receiving pay as members of the permanent staff of a militia regiment, and amongst other specified persons, to all men enrolled in the reserve force when called out for active training, or when kept on duty, having volunteered their services, or when called out in aid of the civil power, or when called out on permanent service under Her Majesty's proclamation. Now, so far as the letters set out in the Petition of Right make a contract, there are no emoluments attached

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to the office to which Mr. Tufnell was appointed. To ascertain what the emoluments were, the Queen's Regulations must be looked at, and there is nothing to show that the half-pay now received by him does not exceed the whole emoluments to which he was entitled under the permanent appointment. And if he receives his pay under the Queen's Regulations, he holds his office upon the terms upon which all the offices in the army are held, that is to say, at the good-will and pleasure of the Crown.

\* Even staff appointments, to which officers are appointed [\* 168] for five years, are held subject to the same regulations.

[MALINS, V. C. : Nearly all appointments are held on the same tenure. Judges formerly so held their appointments, though now these offices are held permanently, in the sense that the occupants cannot be removed except upon an address of both Houses of Parliament.]

There is not much in the nature of authority on this subject, and so far as appears, no direct claim of this kind has ever been made; but where questions of this kind have come before the Court indirectly, an officer in the army has been invariably held to hold his office subject to the will of the Crown. Such a case is *Gibson v. East India Company*, 5 Bing. N. C. 262, in which the point decided was that the retiring pension of a medical officer in the East India Company did not pass to his assignees in bankruptcy. Lord Chief Justice TINDAL, in that case, touches on the relations between Her Majesty and the officers in the army, and grounds his decision upon the principle that no action could be supported against any one to recover the arrears of half-pay. And sect. 7 of Sir W. Bovill's Act expressly provided that the Act shall not create rights where they did not previously exist.

It is possible that public money may be so received by a public officer that he may be regarded as a trustee and liable to an action for money had and received, as in *Gidley v. Lord Palmerston*, 3 Brod. & Bing. 275, 7 Moore, 91. But except in that way, on a petition of right as distinguished from a petition of grace, there is no redress.

Then there is the case of *Re Poc*, 5 B. & Ad. 681, which was an application for a prohibition to issue to a court-martial, and the application was refused on the express ground that the power of dismissal might have been lawfully exercised even without any court-martial.



The two grounds on which the case rests are, first, that every officer holds his post absolutely at the pleasure of Her Majesty; and, secondly, that under the Mutiny Act, there is no power to constitute or to appoint a person to any office which is [\* 169] permanent \* in the sense of being tenable for life, or subject to be vacated only in case of misconduct or incapacity. The petition, moreover, does not make out any case of real hardship.

Fry, Q. C., Locock Webb, Q. C., and E. U. Bullen, in support of the petition:—

It may be quite true that with regard to officers simply serving in the army they hold their appointments merely in accordance with the good pleasure of the Crown, the army being, under the Mutiny Act, a merely temporary establishment existing from year to year. But these conditions do not apply to the case of officers of military prisons, where there are prisoners undergoing sentences extending beyond the duration of the Mutiny Act. It cannot be pretended that every office of this kind must be vacated every year, and if not, there must be such a thing as an office tenable permanently.

Assuming this to be a permanent in the sense of a life appointment, there is a clear case of hardship.

When appointed, the suppliant was entitled to certain emoluments. By long service these emoluments had increased; and then, even assuming that the half-pay he now receives on retirement is equal to his original full pay, he is clearly wronged by the reduction. The addition to his original pay arose from the abolition of an office to the emoluments of which he was also entitled.

An appointment like the present is entirely different in form from that of a commission to an officer in the army, which would simply describe the office without saying anything about its duration. Here the suppliant was expressly appointed to a permanent office in consideration of his waiving his claims to promotion in the ordinary way.

Now there are really two points only to be considered. First, whether the Secretary at War had power on behalf of the Crown to appoint the suppliant to an office for any duration beyond Her Majesty's will and pleasure; and, secondly, whether he exercised it by entering into such a contract. Now, at the date of the appointment the Mutiny Act in force was that of 9 & 10 Vict.

No. 8. — *In re Tufnell*, 3 Ch. D. 169, 170.

c. 11, and by the 28th section, which is repeated in every subsequent Act, it was provided that it should be lawful for the \*Secretary at War to set apart any building then [\*170] erected, or which might thereafter be erected, or any part or parts thereof, as military prisons, and to declare that any such building, or any two or more separate and detached buildings, should be, and thenceforth such building or buildings should be deemed and taken to be a military prison; and that every military prison, whether the same then existed or might thereafter be established, which should be, or which, under the provisions of any former Act of Parliament, had been so set apart or declared, should be deemed to be a public prison within the meaning of that Act. A prison, therefore, is a permanent establishment, and is not created merely *de anno in annum*. But the section goes on as follows: "And all and every the powers and authorities with respect to county gaols or houses of correction which now are, or which may hereafter be, vested in any of Her Majesty's Principal Secretaries of State shall, with respect to all such military prisons, belong to and may be exercised by the Secretary at War." That, in fact, removes them from the authority of the Home Secretary to that of the Secretary at War, and gives a similar authority to the latter in respect to military prisons which the former had with respect to civil prisons. Then it goes on, "And it shall be lawful for the Secretary at War from time to time to make, alter, and repeal rules and regulations for the government and superintendence of any such military prison, and of the governor, provost-marshal, officers, and servants thereof, and of offenders confined therein; and it shall be lawful for the Secretary at War from time to time to appoint an inspector-general and inspectors of military prisons, and a governor or provost-marshal, and all other necessary officers and servants for any such military prison; and, as occasion may arise, to remove the governor or provost-marshal, officer, or servant of any such military prison, and the general or officer commanding any district or foreign station within which may be any such military prison, or such general or other officer, and such other person or persons as the Secretary at War may from time to time appoint, shall be a visitor or visitors of such prison."

The scheme of this enactment is to constitute certain buildings permanent military prisons, and to give the Secretary at War the

same power with reference to appointing officers in and [\*171] about \*them which the Home Secretary has with respect to civil prisons. He has a general power to appoint officers, and it can hardly be said that he can merely appoint them *durante bene placito*. It surely authorizes him to enter into a contract with them for a week, or a month, or a year, or for life. It gives him, in fact, power to appoint permanent officers to a permanent institution. Such appointments are entirely distinct from such as take effect under a commission from the Crown. And without such a power he could not have appointed even a turnkey for a week.

Now there is an authority as to the distinction between an appointment *durante bene placito* and an appointment generally. It is that of *Dighton's Case*, 1 Vent. 82. It was an application to be restored to the office of Town Clerk of Stratford-on-Avon, and the Court could not help the applicant because the corporation had only power by their charter to appoint a clerk *durante bene placito*: but it was held that if the letters patent had been to appoint generally, that would have justified an appointment for life; and the Court were so averse to the idea of an appointment *durante bene placito*, that they hinted at the desirability of issuing a new charter to get rid of the anomaly.

Then the next question is, whether, assuming that the Secretary at War had power to appoint for life, he exercised that power. The letter of the 31st of October, 1846, indicates that the appointment was a special and peculiar one for the permanent medical charge of the prison. For if not, a permanent appointment means one from which the person appointed might be dismissed the very next day. There is no meaning to be put upon the word "permanent" which would make it less extensive than that part of the life of the appointee during which he was able and willing to perform the duties of the office. It stands here admitted, upon this demurrer, that the suppliant is only fifty-six years of age, and that he is able and willing to perform the duties of this office, to which he was appointed upon a specific understanding, which it is not now alleged that he has departed from.

As regards the authorities cited, it is only necessary to refer to *Gibson v. East India Company*, 5 Bing. N. C. 262. It has no application to the present case. It was not a question [\*172] as to the nature of \*appointments under the Crown. It

No. 8. — *In re Tufnell*, 3 Ch. D. 172, 173.

was the case of a corporation which could only make a contract under its common seal, and there was no contract there under the common seal. The question was whether that particular contract came within the class as to which the seal of the corporation was not required.

*In re Poe*, 5 B. & Ad. 681, shows merely, what is entirely undisputed, that officers of the army and navy have no right by way of grant by virtue of their commissions. But this is a case depending upon the express grant of a permanent appointment to a special office.

MALINS, V. C. :—

I am sorry to be obliged to come to the conclusion that the case is entirely against Mr. Tufnell. This is a petition of right claiming compensation against the Crown, not for dismissal from any office, but for removal in this sense, that instead of continuing to hold the office he has been put on half-pay. He complains of having been put upon half-pay at the age of fifty-six when still fully able to continue to perform the duties of his office, the emoluments of which would have been greater if he had risen with other officers than the half-pay which he receives.

Now, before I advert to the very important questions which have been raised upon this petition of right, I think, first of all, one ought to see whether there is any grievance of which Mr. Tufnell has any just reason to complain. What he complains of is, that in 1846 he received from the Crown the permanent appointment of medical charge of the military prison at Dublin, on the understanding that he was to continue to perform the same duties and forego all future claim to promotion as a medical officer in the army.

Now it appears by the statement in the petition of right that in the year 1841 Mr. Tufnell became assistant-surgeon in the army, and was on the staff stationed in the city of Dublin as assistant-surgeon in charge of the existing provost prison. Shortly afterwards, for reasons which have not been explained, but which one can very well understand, Mr. Tufnell preferred what he called a permanent appointment at a fixed station, rather than being liable to be ordered about the world as all military men, whether combatant \* officers or medical officers, are liable to be. [\* 173] [His Lordship then read the letters above set forth, and continued :—]



## No. 8. — In re Tufnell, 3 Ch. D. 173, 174.

Now there is no allegation in this petition of right that the emoluments which he receives upon his retirement on half-pay are less than those of the appointment which he says was a permanent one under the letter of the 31st of October, 1846, and if by any arrangement with the Government he gets as much now as he would have got by retaining the appointment which was conferred upon him on the 31st of October, 1846, there is no grievance of which he has any reason to complain, and upon that ground alone I think the petition of right fails.

But I intend to decide the case on far higher grounds than those.

The Mutiny Act which was in force in 1846 was the 9 & 10 Vict. c. 11; by the 28th section, as usual, the Secretary at War is authorized to set apart buildings as military prisons, and to make rules and regulations for the government of the same. [His Lordship then read sect. 28, and continued:—]

It is argued that this enactment confers upon the Secretary of State power to appoint medical officers for life. I am clearly of opinion that it confers no such power, and that it only enables him to select the proper officers for the management of the prison, and those officers, when selected, are, like all other officers in the naval and military service, liable to the rules of that service, and removable at the will and pleasure of the Sovereign. It would be a most injurious thing to the public service if the Crown had not the power, which we know it has and exercises constantly, of saying to any naval or military officer misconducting himself, whether in his military or naval, or in his private capacity, simply by notice in the "Gazette," that the Crown has no longer occasion for his services. It is an arbitrary power, and one which may be exercised most injuriously to the interests of the officer, but such is the benignity and the conduct of Government and of the Sovereign towards all officers, naval, military, or others, that it is never exercised arbitrarily or improperly, or except on proper occasions, and it is absolutely necessary for the discipline of the army and navy, and for the good conduct of the public service, that such an arbitrary power should exist. Therefore, in what-

ever situation an officer may be placed, as, for instance, a [\* 174] \*captain, or the senior major of a regiment, expecting every day, on the retirement of the colonel, to have the command of the regiment, he may have another officer summarily appointed over his head, or a stranger brought from another regi-

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ment, or he may be summarily removed. My opinion, therefore, is that the power of appointing a military officer under that section only extends to an appointment subject to the rules of the service, and therefore removable at the will and pleasure of the Crown with or without reason. Still I think it was quite right for the Under-Secretary of State, on behalf of the then Secretary at War, to intimate to Mr. Tufnell that which I believe was intended to be and was honourably fulfilled, — that the appointment when made was to be of a permanent character; and that so long as the authorities were satisfied with his services, they had no intention to remove him, and he would not be removed. He accordingly continued to hold that appointment for a period of no less than twenty-eight years, that is to say, from 1846 to 1874. But in the mean time, although Mr. Tufnell had bound himself not to make any claim for promotion, he had been appointed *Regius Professor of Surgery*, and attached to that, as appears by this petition, he had a salary of £100 per annum, and a fee of three guineas for every pupil not in the service whom he should instruct as *Regius Professor*. That appointment was in time abolished. He makes that a subject of complaint, and says that he was appointed for life. This view, in my opinion, could not be sustained, but the Government treated the case very fairly, and although they did not give him remuneration, yet, in consideration of all the circumstances, they promoted him to the full rank of surgeon, and afterwards to that of surgeon-major.

Now, then, in 1874, for reasons which I know nothing about, the Crown thinks fit not to remove Mr. Tufnell, or to do anything offensive to him, but, treating him as entitled to the half-pay of his rank, which gives him £365 a year, or £1 a day, they require, either because he was then fifty-six years of age, or for other reasons, that he should retire on half-pay. He remonstrated. He considered that he had a permanent appointment which he was entitled to retain. However, I have stated my opinion that he was appointed subject to all those rules which affect the officers of the army and \*navy, and, as a medical officer, [\*175] was, like every other officer, liable to be dismissed, to be put on half-pay, to be ordered to retire or to take any step which the Crown for its convenience may desire, or for the benefit of the public service may think proper to adopt.

Now, with regard to the law, every case cited before me pro-

ceeds upon the same principle which was laid down in *Gibson v. East India Company*, 5 Bing. N. C. 262. The question there was whether the assignee of an officer of the East India Company (who was treated by the Court of Queen's Bench just like an officer in the Queen's service) who had become bankrupt could maintain an action against the East India Company for the amount of his half-pay.

The Lord Chief Justice TINDAL in his judgment says this (5 Bing. N. C. 273, 274). "The resolution, however, is a general regulation affecting the whole of the army, not a separate contract with any individual officer; and although it may differ in some particulars from a grant of half-pay by the Crown to the officers of the army or navy upon their retirement from actual service, yet it bears a much stronger analogy to it in the mode of its being granted and in the consequences attending it than to any contract. Now it is clear that no action could be supported against any one to recover the arrears of half-pay granted by the Crown, at least unless the money has been specifically appropriated by the Government and placed in the hands of the paymaster or agent to the account of the particular officer; and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances in the present case." The question of law here decided therefore is, that although the Crown may order an officer to retire on half-pay, and prescribe that the half-pay shall be of a certain amount, if the Crown thinks fit to withhold that half-pay, it is absolutely impossible to recover it. Then he continues: "It was indeed strongly argued at the Bar that as the resolution under which the retiring pensions are paid has been sanctioned by the commissioners for the affairs of India, it has by such approval become obligatory on the company and in the nature of a contract, but we think there is no ground for giving such operation to the Act. The object of the statute (33 [\*176] Geo. III. \*c. 53) was that of creating a board of commissioners to superintend, direct, and control the acts, operations, and concerns, relating to the civil and military government or revenues of the company's territories and acquisitions in the East Indies, to make the approval of the board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself beyond that which it originally possessed." Then he puts the whole subject-matter upon this: "The

granting question" — that is, the grant of half-pay — "therefore appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations; obligations which want the *vinculum juris*, although binding in moral equity and conscience to be a grant which the East India Company, as governors, are bound in *foro conscientie* to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a court of law." So I say here. This obligation wants the *vinculum juris*, though it may be an obligation in *foro conscientie*, a moral obligation which ought to be imposed, but it cannot be enforced in any court of law.

The same principle follows from what was decided in the case of *Gidley v. Lord Palmerston*, 3 Bro. & Bing. 275, 7 Moore, 91. That was a much earlier case. There it was held that money could not be recovered, even when it had been paid into the hands of the Secretary of State for the purpose of paying the half-pay and appropriated to that particular object. So nothing can be more clear than that, now that Mr. Tufnell is retained on half-pay, if the Crown thinks fit to withhold the half-pay, he has no remedy whatever, but is entirely at the mercy of the Crown, and by no petition of right or any other proceeding can he enforce the payment even of his half-pay. The case of *In re Poe*, 5 B. & Ad. 681, proceeds upon the same principle. It decides that a prohibition cannot issue to a court-martial after its sentence has been ratified by the Queen and carried into execution. There is a litigation in which Colonel Dawkins complains that when, upon the eve of succeeding to the command of a battalion of the guards, he was summarily, and without reason, and, as he contends, for improper reason, put on half-pay. He has been litigating the question in every Court, and at last carried it to the House of \* Lords, where [\* 177] it was finally decided against him. That litigation has resulted in showing most clearly that every officer in the army is subject to the will of the Crown, and can be removed and put on half-pay, or dealt with as the Crown, with a view to the public convenience, thinks best. It is a power which is always considered to lie in the Crown, a rule which has never been departed from, and therefore, on general principles, I come to the conclusion that Mr. Tufnell has no ground whatever to complain. He ought to bear in mind that during the last thirty-five years he has been an officer of the British army, and, as such, subject to the



will and pleasure of the Crown, which will retain or remove him as it thinks fit.

I am therefore of opinion that the demurrer must be allowed, with costs if asked for.

### **Grant v. Secretary of State for India in Council.**

2 C. P. D. 445-464 (s. c. 46 L. J. C. P. 681; 37 L. T. 188; 25 W. R. 848).

#### *Indian Appointment. — Terms of Service. — Dismissal.*

[445] In an action against the Secretary of State for India the claim stated that plaintiff accepted a commission in the military service of the East India Company upon the basis and faith of the customs, laws, regulations, and provisions of the company's service, which were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient, — and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him, and should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that the plaintiff was compelled to subscribe to a military fund to provide for widows and orphans of officers, and that if he had continued in the service his widow would have been entitled to an allowance out of a fund called "Lord Clive's Fund." That after the Indian forces had been transferred to the Crown he, while in the performance of military duty, and in all respects physically and mentally competent to perform any duties which were or might be required of him, — was, without any charge of misconduct, called upon to retire from the service, in pursuance of a general order made by the Governor-General of India with the sanction of the defendant, by which order unemployed officers ineligible for employment by reason of clear misconduct, or proved physical or mental inefficiency, &c., might be required to retire upon a pension; and, upon his declining voluntarily to retire, he was compulsorily placed upon the pension-list; and the fact of his removal to the pension-list was notified in the usual way by a general order of the Commander-in-Chief published in the *Gazette*: —

*Held*, on demurrer, that the claim disclosed no cause of action, for the Crown, acting by the defendant, had a general power of dismissing a military officer at its will and pleasure: that the defendant could make no contract with a military officer in derogation of such powers; and the customs, regulations, &c., relied on by the plaintiff must be taken to be always subject to it, and incapable of superseding it; and further, that the publication in the *Gazette* was an official act under the authority of the Crown, for which the defendant could not be responsible in an action for libel.

Claim 1. On the 3rd of January, 1840, the plaintiff was appointed to an ensigncy in the military service of the East India Company in the presidency of Madras, by a commission under the hand of the Right Hon. John Lord Elphinstone, the governor

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and commander-in-chief of the fort and garrison of Fort St. George, and the seal of the East India Company.

2. Plaintiff entered and accepted his commission upon the basis and faith of the customs, laws, regulations, and provisions of the \* East India Company's service, and which [\* 446] were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient, and should not leave the said service without the permission of the East India Company, and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him, and that he should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that no officer or soldier should be punished for any military offence committed three years prior to the initiation of punitive measures.

3. In addition to the customs, rules, and regulations stated in the last paragraph, it was at the time the plaintiff entered the service as aforesaid, a compulsory regulation of the service that all persons nominated as cadets should be required, as a condition to their appointment, to subscribe to the military fund of the presidency to which they belonged.

The objects of the institution of the said military fund were, to provide for the families, that is, the widows and orphans, of officers; and it was a provision of the institution that the amount of the subscription of officers should be and was regulated in proportion to their respective rank and pay, the subscriptions and donations of married officers being much larger than those of unmarried officers, and otherwise as provided by the several articles by which the institution was regulated.

4. The benefits to which the widows and orphans of officers were entitled out of the military fund consisted and consist of an annuity to the widow during her life or widowhood, an annuity to each son up to a certain age, and an annuity to each daughter during her life or until her marriage; and the amount of the annuity to the widow depended and depends upon the rank or length of service of the officer at the time of his death.

5. By the rules and regulations of the East India Company's service the subscriptions of officers to the military fund were retained by the military paymaster from the pay of officers before the issue of such pay.

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6. The plaintiff is a married man, and ever since he entered the service his subscriptions and donations to the military fund have \*always been paid or deducted from his pay, in proportion to his rank for the time being in the service and his position of a married man, in accordance with the regulations; and the amount contributed by him to the said fund exceeds £1300, and his subscriptions at the time he was removed from the service as hereinafter mentioned were £58 per annum.

7. A further inducement held out by the East India Company to the plaintiff and other persons for entering their military service, and upon the faith of which he entered such service, were certain valuable advantages to which, if he continued in the service, his widow and orphans (if any) would, if he had so long continued in the service of the company, have been entitled out of a fund commonly called or known as “Lord Clive’s Fund;” and by the regulations of the same fund the plaintiff’s widow (if any) would have become entitled to an annuity of £114 per annum.

8. The plaintiff continued from 1840 in the service of the East India Company under the circumstances before stated, down to 1858, in which year, by 21 & 22 Vict. c. 106, “An Act for the better government of India,” it was (amongst other things) enacted that the government of the territories then in the possession or under the government of the East India Company, and all powers in relation to such government, should be vested in her Majesty, and that the real and personal property of the company, (except as therein mentioned) should vest in her Majesty, subject to the debts and liabilities affecting the same (s. 39), and further, in effect, that her Majesty’s Secretary of State for India in Council should have and perform the several powers and duties in any wise relating to the government of revenues of India as might or should, except for that Act, have been exercised or performed by the East India Company (s. 3), and that the Secretary of State in council might sue and be sued in India and England by the name of the Secretary of State in Council as a body corporate (s. 65); and it was by that Act further enacted that the military and naval forces of the East India Company should be deemed to be the Indian military and naval forces of her Majesty, and should be under the same obligations to serve her Majesty as they would have been to serve the company and, be entitled to the like pay;

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pensions, allowances, and privileges, and the like advantages as regarded \* promotion and otherwise, as if they had [\* 448] continued in the service of the company (s. 56); and, further, that the transfer of any person to the service of Her Majesty should be deemed to be a continuance of his previous service, and should not prejudice any claim to pension or any claim on the various annuity funds of the several presidencies in India which he might have had if that Act had not been passed (s. 58).

9. By 29 Vict. c. 18, the funds belonging to the before-mentioned military fund were transferred to the Government of India, subject to the rights of the subscribers therein and to the liabilities affecting the same; and the same Government thereby became and are trustees of the same fund for the benefit of the plaintiff and his family.

10. The plaintiff in 1871 was promoted to the brevet-rank of colonel. In July, 1869, he was appointed officer in charge of military pensioners and family certificate holders at Kamptee, and performed the duties of that office up to January, 1873, without any charge or complaint ever having been made against him.

12 and 13. On the 12th of January, 1873, whilst the plaintiff was perfectly in possession of his physical and mental faculties, and was capable of continuing to perform the duties upon which he was then engaged as stated in the last paragraph, or any other duty which might have been imposed upon him, he was called upon by the adjutant-general of the Madras army to send in an application to retire from the service, on the pension to which he was then entitled, viz. £365 per annum, under a general order, No. 797, dated the 1st of August, 1873, which was in the words and figures hereinafter stated in par. 17.

14. The plaintiff declined voluntarily to send in his application to retire, and continued to perform his duty, without any complaint as to his efficiency, up to the 14th of April, 1873, when he was compulsorily placed by the Government upon the pension-list, by the General Order of that date in par. 17 stated.

15. The plaintiff, in April, 1873, was not in the position of the persons contemplated by and described in the aforesaid order, No. 797, and such order could not legally be applied to him, he being at the time referred to in the performance of military \* duties, which he performed to the entire satisfaction of [\* 449]



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his immediate superior officer. And, even if he had been one of such persons, he never did any such act or was guilty of any such offence as was and is contemplated by the same order; and the aforesaid compulsory retirement of the plaintiff was effected solely with the object of preventing him by length of service from obtaining the higher grade of pension, and saving the difference to the Government.

16. The plaintiff has sustained pecuniary damage arising from the fact that he has been illegally deprived since April, 1873, of the pay and allowances which whilst in the service at the date of the general order of the 14th of April, 1873, he was enjoying, and which present pecuniary loss exceeds £1800, and of the higher pension to which he would have been entitled had he remained in the service; and from the loss of his proper pay and allowances he is unable to keep up out of his present pension his subscription to the military fund; and the Government of India, as hereinbefore stated, declare that if he fail to make any one necessary payment, he will forfeit the pension to which his family may be entitled out of the fund. The plaintiff has, under the circumstances stated, been compelled to accept £365 per annum, being the pension to which, according to the rules of the service, he was entitled after twenty-six years' service. If, however, the plaintiff had continued in the service for two years longer, he would have been entitled to a pension of £456; and if he had continued in the service until the 3rd of January, 1878, he would have been entitled to a pension of £1124 per annum.

17. The plaintiff's character has been libellously defamed by the same Government and the defendant, under the circumstances following, that is to say: The General Order, No. 797, dated the 1st of August, 1872, hereinbefore referred to, was partly in the words and figures following:—

The Government of India, having been in communication with the Right Hon. the Secretary of State in regard to the measure to be adopted towards reducing the number of unemployed officers of the armies of the three presidencies, the Governor-General in Council is pleased to publish for general information the [\* 450] following \*orders containing the final decision of her Majesty's Government:—

(3) Unemployed officers who are ineligible for public employment by reason either of clear misconduct or proved physical or

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mental inefficiency, or who may have been removed from their employments for inefficiency, or who have by distinct and undeniable misconduct rendered themselves ineligible for regimental employment, will be called upon to send in their application to retire upon such pension as they may be entitled to under the regulations; and, if they should fail to do so within three months from the date of their being so called upon, they will be removed to the pension-list. Her Majesty's Government do not object to special consideration being shown, in the grant of the next higher rate of pension, to those officers who have in the opinion of the Governor-General in Council deserved well of the state by reason of the length and character of their previous services.

The above-stated General Order was published in the "Gazette" and in the Madras Government Orders. The order removing the plaintiff from the effective list and compulsorily placing him on the pension-list hereinbefore referred to, and dated the 14th of April, 1873, was as follows:—

GENERAL ORDER,

FORT ST. GEORGE, MADRAS,  
14th April, 1873.

Under the authority of her Majesty's Government notified in par. 3 of G. O. S. No. 797, dated 1st August, 1872, the under-mentioned officers are removed to the pension-list from the dates specified, —

Colonel C. D. Grant, of the staff-corps, from the 13th April, 1873, on £365 per annum.

By order of his Excellency the Commander-in-Chief.

The last-stated order was published in the "Gazette," and thence copied into various local publications in India, where the plaintiff then was.

18. The plaintiff is the Colonel C. D. Grant referred to in the last-stated order. He was not at the date of the same order an "unemployed officer ineligible for public employment," being then engaged upon the duties hereinbefore mentioned. He was not of "proved physical or mental inefficiency." He had not "been removed from his appointment for inefficiency." And he had not "by distinct and undeniable misconduct rendered himself ineligible for regimental employment." After he left his

[\* 451] \*regiment in August, 1866, he was ordered and appointed to the staff-corps and otherwise employed as hereinbefore stated down to April, 1873, being a period of nearly seven years.

The plaintiff claimed to be restored to the position he held in the service before the issuing of the order of the 14th of April, 1873, and to be paid the pay and allowances to which he was or except for that order would be now entitled, and to have the full benefit to which he and his family were and would or might hereafter become entitled out of the aforesaid military and Lord Clive's funds respectively secured, preserved, and provided for, or otherwise.

To be paid £10,000 by the defendant as damages in respect of the plaintiff's wrongful removal from his employment in the aforesaid service, and for the libellous defamation of his character under the circumstances hereinbefore set forth.

Demurrer, on the ground that "the plaintiff sought to obtain relief for injury by him sustained in consequence of orders passed and acts done by the defendant, as the executive government, on behalf of her Majesty the Queen affecting the plaintiff in his capacity of an officer holding a commission in her Majesty's Indian military forces.

The demurrer was argued before GROVE, J., on the 10th and 12th of May, 1877, by Sir James Fitz Stephen, Q. C. (Graham with him), for the defendant, and Grantham, Q. C. (Cotterell with him), for the plaintiff. *Cur. adv. vult.*

The arguments, statutory provisions, and authorities referred to on either side are fully noticed in the judgment.

May 29. GROVE, J. In this case, the plaintiff, formerly an officer in the East India Company's service, appointed in 1840, and subsequently continuing in the Indian army when the Indian military and naval forces were transferred to the Crown, brings an action against the defendant for damages for being on the 14th of April, 1873, compulsorily placed by the Government upon the pension-list, and so compelled to retire from the army; and also for libel, the alleged libel being the publication in the "Indian Gazette" of his removal to the pension-list, purporting to [\* 452] be by \*order of the commander-in-chief, and for which he alleges the defendant is responsible.

The statement of claim was demurred to, mainly on the ground

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that the orders were made and the acts were done by the defendant as the executive government on behalf of her Majesty, affecting the plaintiff in his capacity of an officer holding a commission in her Majesty's Indian Forces, and that it is not competent for this Court to adjudicate upon the validity or propriety of such orders or acts. Some objections were taken as to the form of this demurrer. I thought it sufficient to raise the points argued, offering to amend if required; but after an adjournment no amendment was required.

It was argued on behalf of the defendant that the dismissal or compulsory retiring of an officer by the Crown was an absolute right in the Crown over every military officer; and, as regarded the Indian forces, that this right had been given by statute to the East India Company, and that all its powers were transferred to the Crown when the territories and powers of Government of the East India Company were transferred to the Crown; and, as to the claim in respect to libel, that the defendant was not liable as Secretary of State for such publication in the "Gazette."

For the plaintiff it was admitted for the purposes of this case that the Queen had in ordinary cases such power of dismissal or retiring; but it was contended that the East India Company had by a contract, express or implied, with its military officers, including the plaintiff, waived this right or contracted itself out of it, and that the plaintiff retained his rights under such contract as against the Secretary of State for India representing the Crown; and that the defendant was responsible for the libel though its publication was no personal act of his.

The alleged contract is set out in paragraph 2 of the statement of claim, as follows: "Plaintiff entered and accepted his commission in the military service of the East India Company upon the basis and faith of the customs, laws, regulations, and provisions of the said East India Company's service, and which were (amongst others) that an officer entering the said service should continue therein so long as he was physically and mentally efficient, and should not leave the said service without the permission of the \*said East India Company; and that, [\*453] before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him, and that he should be summoned to make his defence having a reasonable time allowed him for that purpose;



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and that no officer or soldier should be punished for any military offence committed three years prior to the initiation of punitive measures." And it is further alleged (in pars. 3, 4, and 7), — I presume as tending to show a status of irremovability, — that the plaintiff compulsorily subscribed to a military fund to provide for widows and orphans of officers, and that his widow would, if he had continued in the service, have been also entitled to certain advantages out of a fund known as "Lord Clive's Fund."

I am of opinion that the East India Company, and afterwards the Crown, had the absolute power to dismiss or compel retirement of an officer in the Indian army; that the power in the nature of Crown Prerogative, conferred upon the East India Company, being for the public benefit, the safety of the realm, and possibly the existence of the Indian empire, could not be waived by contracts with officers; that the relation of an officer to the East India Company and to the Crown is not in the nature of an ordinary contract; and, further, that the allegations and facts set out in paragraph 2 of the statement of claim do not, as stated, constitute a binding contract by which the East India Company abandoned or excluded their power of removal or dismissal at will, as I regard such statement as consistent with the customs, laws, regulations, and provisions, being general regulations for the ordinary management of the forces, subject to be changed, if necessity or the better discipline or efficiency of the forces should so require.

Upon the claim for damages for libel, I am of opinion that a Secretary of State is not liable for a publication in the "Gazette," if done in the exercise of his duty as Secretary of State, — at all events, when such so-called libel is not alleged to have been published maliciously and without reasonable and probable cause; that the publication in the "Gazette" being, as appears on the statement of claim, a correct statement of the act of the Government, the Secretary of State is not liable for libel; and that, the publication purporting to be published by order of his [\* 454] Excellency the \*commander-in-chief, and there being no allegation that the Secretary of State was personally privy to the publication, no cause of action is disclosed against him.

The 75th section of the statute 3 & 4 Wm. IV., c. 85, is as follows: "Provided always, and be it enacted, that nothing in this Act contained shall take away the power of the said Court of Directors to remove or dismiss any of the officers or servants of the

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said company, but that the said Court shall and may at all times have full liberty to remove or dismiss any of such officers or servants at their will and pleasure: provided that any servant of the said company appointed by his Majesty through the default of appointment by the said Court of Directors shall not be dismissed or removed without his Majesty's approbation as hereinbefore (s. 74) is mentioned." There is a similar provision in 33 Geo. III. c. 52, s. 36.

The first-mentioned statute was to continue until the 30th of April, 1854. By 16 & 17 Vict. c. 95 (which received the royal assent on the 20th of August, 1853), s. 1, reciting the above statute of 3 & 4 Wm. IV., the provisions of that Act were, save as altered, to continue in force until Parliament should otherwise provide, and the East India Company were to continue the Government, in trust for her Majesty.

The statute 21 & 22 Vict. c. 106, reciting the last-mentioned statute, enacts in s. 3, that, "Save as herein otherwise provided, one of her Majesty's principal Secretaries of State shall have and perform all such or the like powers and duties in any wise relating to the Government or revenues of India, and all such or the like powers over all officers appointed or continued under this Act as might or should have been exercised or performed by the East India Company or by the Court of Directors or Court of Proprietors of the said company, either alone or by the direction or with the sanction or approbation of the commissioners for the affairs of India in relation to such Government or revenues, and the officers and servants of the said company respectively, and also all such powers as might have been exercised by the said commissioners alone; and any warrant or writing under her Majesty's royal sign manual which by the Act of 17 & 18 Vict. c. 77 or otherwise is required to be countersigned by the president of the \*commissioners for the affairs of India shall in [\*455] lieu of being so countersigned be countersigned by one of her Majesty's principal Secretaries of State."

Several Mutiny Acts have been passed with respect to the Indian forces, *et. gr.* 4 Geo. IV. c. 81, 3 & 4 Vict. c. 37, and 26 & 27 Vict. c. 48.

The East India Company, besides their powers to carry on trade as merchants, had by the above and previous statutes powers of sovereignty delegated to them. It is sufficient for this purpose to

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quote a passage from Lord KINGSDOWN's judgment in the case of *The Secretary of State for India v. Sahaba*, 13 Moo. P. C. 22, at p. 77. "The subsequent statute, 3 & 4 Wm. IV., c. 85," he says, "in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of sovereignty."

The powers mentioned in the above-quoted section, of removal or dismissal of an officer at the will and pleasure of the company, it cannot, as it seems to me, be disputed, belong to the class of such delegated powers, now restored to the Crown acting by the Secretary of State for India. As this power exists for the benefit of the empire and of her Majesty's subjects, it could not in my judgment be contracted away by the East India Company. If with one officer such a contract could be made, it could with all. In fact the plaintiff's case apparently is that it was made with all. If so, all officers whom a jury might consider to be "physically and mentally efficient" could retain their places in the army notwithstanding they were found to be most unsuitable for them. The consequences of such a state of things to the well-being of the realm would be most disastrous. It would prevent that power of dealing with officers according to their fitness for duty as judged by their superior officers, it would be fatal to the maintenance of discipline, and, in time of war, mutiny, or insurrection, might well be fatal to the state and commonwealth. It does not need enlarging upon.

In the case of *John Waller Poe*, 5 B. & Ad. 681, which was an application for a prohibition to restrain the execution of the sentence of a court-martial, Lord DENMAN, in giving judgment, [\*456] says, at p. 688: "If, then, \*the writ were to issue at all, we see no Court or individual to whom it could be addressed other than the king himself, who, acting on the sentence, has been pleased to dismiss the officer from his service. Now, admitting for a moment that it were possible to address any writ directly to his Majesty, when it is considered that this power is undoubtedly inherent in the Crown, and might have been lawfully executed even without any court-martial, it will at once appear manifest that no prohibition can lie in such a case; for, what the king had power to do independently of any inquiry, he plainly may do though the inquiry should not be satisfactory to a Court of law, or even though the Court which conducted it had no legal jurisdiction to inquire."

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In *Gibson v. East India Co.*, 5 Bing. N. C. 262, 274, which was a case of claim by the assignees in bankruptcy of a military officer of the East India Company for his retiring pension, TINDAL, C. J., though of opinion that the East India Company might have made a grant under seal for the payment of the pension, says, speaking of a right of action for half-pay, "Now, it is clear that no action could be supported against any one to recover the arrears of half-pay granted by the Crown, at least unless the money has been specifically appropriated by the Government and placed in the hands of the paymaster or agent to the account of the particular officer: and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances, in the present case. It was, indeed, strongly argued at the Bar, that, as the resolution under which the retiring pensions are paid has been sanctioned by the commissioners for the affairs of India, it has by such approval become obligatory on the company, and in the nature of a contract; but we think there is no ground for giving such operation to the Act. The object of the statute (33 Geo. III. c. 52) was that of creating a board of commissioners to superintend, direct, and control the acts, operations, and concerns relating to the civil and military government or revenues of the company's territories and acquisitions in the East Indies; to make the approval of the board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself beyond that which it originally possessed. The \*grant in ques- [\*457] tion, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations, — obligations which want the *vinculum juris*, although binding in moral equity and conscience; to be a grant which the East India Company, as governors, are bound in *foro conscientie* to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a Court of law. Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a Court of law readily suggest themselves. If the retired pension which is given for former services can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and



kept in arrear beyond the day when it becomes due, and until the service in respect of which it is earned has been entirely completed? Not to mention the expense and inconvenience which must arise if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service. But, if the allowance of this pension will furnish a ground of action against the company, no legal distinction can be assigned why the grant of pay during actual service, which is authorized by general orders founded on resolutions of the directors confirmed in the same manner by the board of commissioners, should not be equally the ground of an action at law."

In *Ex parte Napier*, 21 L. J. Q. B. 332, which was an application for a *mandamus* to the East India Company to command them to pay arrears of pay to Sir C. Napier, due to him as commander-in-chief of the forces of the Queen and of the East India Company, Lord CAMPBELL says, at p. 333: "The applicant must make out that there is a legal obligation on the East India Company to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established; for, the existence of a legal right or obligation is the foundation of every writ of *mandamus*; but it seems to us that the attempt to show that there was any [\* 458] obligation on the East India \* Company, which the law will enforce to pay any sum of money to Sir Charles Napier, either as commander of the Queen's forces, or as commander of the native troops, has entirely failed. A legal obligation, which is the proper substratum of a *mandamus*, can only arise from common law, from statute, or from contract. Of course, the obligation here contended for cannot arise from the common law, and is not rested on contract." And, after going through several statutes relating to the East India Company, and referring to the case of *Gibson v. East India Company*, 5 Bing. N. C. 262, the rule for a *mandamus* was refused.

In a recent case, *In re Tufnell*, p. 233, *ante*, 3 Ch. D. 164, which was a petition of right by a military surgeon for compensation for having been put on half-pay, he having, as alleged, on condition of waiving his right to promotion, been appointed to the permanent medical charge of the military prison at Dublin, and afterwards compulsorily retired on half-pay, MALINS, V. C., held on demurrer that the Court had no jurisdiction to inquire into the circum-

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stances under which he held the office, and that the office, like all others in the army, was only tenable *durante bene placito*.

In the case of *Dickson v. Lord Combermere and General Peel*, 3 F. & F. 527, 585, which was an action against the defendants for causing, by means of false charges, the removal of the plaintiff from the office of lieutenant-colonel of a regiment of militia, COCKBURN, C. J., lays it down generally that a high officer of state is not responsible for an act done by him in the honest discharge of his public duty: and, upon counsel suggesting that "there may be an exception in the case of a judicial act," his Lordship says: "No; nor is this a judicial act at all. It is an exercise of the pleasure of the sovereign through a high officer of state. The sovereign has the power of dismissing any officer. He receives his commission from his Sovereign, and holds it at his pleasure; and it is in the will of the Sovereign to withdraw it. It is the will of the Sovereign to exercise that power through responsible servants of the Crown, and they are not responsible for its exercise before a jury."

Assuming that the East India Company could contract with a \* military officer, does the statement of claim dis- [\* 459] close such a contract? The alleged contract is contained in paragraph 2, which I have already given *verbatim*. The statement does not say that the East India Company entered into an express binding contract not to dismiss him, or that it guaranteed or pledged itself that he should continue in the service so long as he was physically and mentally efficient, or that its rules should never be altered; but it alleges that he entered the service on the basis and faith of such "customs, laws, regulations, and provisions." The word "laws" in this paragraph, read with the context, I do not take to mean statutes or laws of the realm, but laws in the sense of rules, or analogous to by-laws. Doubtless, in many cases, as between individuals or companies or corporations, the entering a service upon rules stated by the dominant person or body would constitute a contract; but, military service, being, as I have stated, in many particulars different from an ordinary service under a contract, it seems to me that the terms used in this paragraph must be taken in the sense of their proper application to military service, which is the service spoken of in the paragraph; and that, so read, they must be taken to refer to existing customs, laws, regulations, and provisions, subject to be changed

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by the necessities inherent in military regulations, and not overriding the power of dismissal or removing at will. Sect. 56 of 21 & 22 Vict. c. 106, does not, it seems to me, alter this view; perhaps it strengthens it by saying that the forces shall be subject to all Acts of Parliament, laws of the Governor-General of India, and articles of war, and all other laws, regulations, and provisions relating to the East India Company's military and naval forces respectively, as if her Majesty's Indian military and naval forces respectively had throughout such acts, laws, articles, regulations, and provisions been mentioned or referred to instead of such forces of the said company.

The majority of officers enter the military or naval service on the basis and faith of the existing rules of the service; but this cannot be held to constitute a contract not to dismiss or remove them at will.

I am not wholly free from doubt on this second point, which doubt however only rests upon the technical necessity on [\* 460] demurrer \* of assuming the truth of the facts alleged in the pleading demurred to.

With regard to the claim at the end of the plaintiff's statement, it is proper to observe that he does not claim a return of the money he has subscribed to the military fund, but only claims the ultimate benefit of it. I presume he is not prevented by the Government from continuing to subscribe, as he states (par. 16) that from want of means he is unable to keep up his subscription. Whether if he discontinues his subscription, he can recover the money paid, I am not called on to decide, as he does not claim the repayment of this money. And with regard to Lord Clive's Fund, under which the plaintiff states (par. 7) his widow and orphans, if any, would be entitled to certain valuable advantages, he states no present loss or damage or refusal to pay in the future.

If the widow or orphans of an officer removed to the retired list are by the rules of the service entitled to any advantage out of this fund, the plaintiff's widow and orphans will obtain it: any claims he may have are, as stated in 21 & 22 Vict. c. 106, s. 58 (preserved by 22 & 23 Vict. c. 27), not prejudiced by that Act. If in consequence of his removal he ceases to be entitled to them, and I am right that the East India Company had, and now the Government has, the power of dismissing or removing him at will, the plaintiff must abide the consequences of the removal.

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It may be worth observing that, by the judgment of the House of Lords, in 1863, in the case of *Walsh v. The Secretary of State for India*, 10 H. L. C. 367; 32 L. J. Ch. 585, the funds contributed by Lord Clive were held, after the transfer of the East India Company's forces to the Queen, to have, subject to existing annuities, become payable to the representatives of Lord Clive, by virtue of a covenant by the East India Company in the original deed.

The plaintiff, secondly, complains, in his statement of claim of libel, alleging that his character has been libellously defamed by the Government of India and by the defendant. The claim then sets out a General Order (par. 17) for the removal to the pension-list of unemployed officers ineligible for public employment by reason of (shortly stated) misconduct or physical or mental inefficiency. \* It further sets out a general order of the 14th [\*461] of April, 1873, published in the "Gazette," stating the removal of the plaintiff to the pension-list under the authority of her Majesty's Government, referring by number to the previous General Order, and ending with the words "By order of his Excellency the Commander-in-Chief." It then (par. 18) states that the plaintiff was not ineligible for public employment within the terms of the order, and claims damages against the defendant.

It is to be observed that, by the statement of claim, the charge against the defendant is of an act in his official character as Secretary of State for India, or rather of a responsibility attaching to him in his official character. He is not alleged to be personally cognizant of the publication in the "Gazette" of the 14th of April, 1873, which does not bear his name. Nor is it alleged that it was published maliciously and without reasonable and probable cause. The statement of claim, moreover, does not allege that the publication in the "Gazette" is not a true record of the act of the commander-in-chief, under the authority of her Majesty's Government.

In the case of *Gidley v. Lord Palmerston*, 3 Brod. & Bing. 275, 7 Moore, 91, which was an action brought against the Secretary at War by a retired clerk of the war office, for his retired allowance, DALLAS, C. J., in giving judgment for the defendant, says (3 Brod. & Bing., at p. 285): "But it must also fail on another and a wider ground. This is an action brought against the defendant, as paymaster-general, for an alleged breach of an implied under-



taking said to attach upon him in that character. With reference to this ground it will be sufficient to advert to a class of cases too well known and established to require to be more particularly mentioned, and which in substance and result have established that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be in the particular instance a breach of such employment, and constituting a particular and personal liability. Such persons, said Lord MANSFIELD, in one of the cases cited at the bar, *Macbeath v. Huldinand*, 1 T. R. 172; 1 R. R. 177, are not understood personally to contract; and in the same case it was observed

by Mr. Justice ASHHURST, ‘ In great questions of policy, [\* 462] we cannot argue from the nature of private \*agreements.’

. . . ‘ Great inconveniences would result from considering a governor or commander as personally responsible.’ . . . ‘ No man would accept of any office of trust under Government upon such conditions; and, indeed, it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt that the Crown will do ample justice to the plaintiff’s demands, if they be well founded.’ Mr. Justice BULLER in the same case adds: ‘ Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.’ And in a subsequent case, *Unwin v. Wolseley*, 1 T. R. 674, it is held that a servant of the Crown contracting on the part of Government is not personally answerable. I am aware that these cases are not in their circumstances precisely similar to the present; and, perhaps in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than, I am now satisfied, I ought to have done; but, in their doctrine, they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which from their very nature would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved; and, though it is to be presumed that actions improperly brought will fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself.”

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It is true this was an action of contract; but the reasons given in the judgment apply generally to "an action against a public agent for anything done by him in his public character or employment," and, as it appears to me, apply *à fortiori* to an action of tort where there is no charge of personal action or personal malice. As many of the earlier authorities are cited in this case, I need not refer to them.

*Dawkins v. Lord Paulet*, L. R., 5 Q. B. 94, was an action for libel brought by an officer in the army against his superior officer, the commander of the brigade, for reports made to the adjutant-general as to the \*conduct and fitness of the [\*463] plaintiff. To the declaration there was a plea that the defendant made the reports in the course of military duty, and as an act of military duty. To this there was a replication that the libel was written by the defendant of actual malice, without reasonable, probable, or justifiable cause, and not *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty. On demurrer to this replication, MELLOR and LUSH, JJ., stating that the late Mr. Justice HAYES agreed with them, held that the replication was bad, COCKBURN, C. J., dissenting: but the LORD CHIEF JUSTICE agreed "that acts done in the honest exercise of military authority are privileged." L. R., 5 Q. B. at p. 102.

In *Dawkins v. Lord Rokeby*, — not the libel case in the House of Lords, which turned upon the privilege of a witness in a military court of inquiry, but at *Visi Prius*, 4 F. & F. 806, — in an action for false imprisonment, malicious prosecution, and conspiracy, WILLES, J., held, referring to the well-known case of *Sutton v. Johnstone*, 1 T. R. 493, 784; 1 R. C. 765, that a Court of law will not take cognizance of matters of military discipline between military men, and nonsuited the plaintiff.

The publication in the "Gazette" of military appointments, retirements, &c., is an ordinary act of Government, and purports so to be in this statement of claim, which, as I have said, alleges no malice, improper motive, or personal act by the defendant, but treats him as acting officially, and sues him as Secretary of State for India in Council. Indeed, it is only by assuming the "Gazette" to be the official organ of Government that the plaintiff can in any way connect the defendant with the alleged libel.

I am of opinion that if, as the last-cited cases show, the commander-in-chief could not be sued for libel, for an act done in

the course of his military duty, the Secretary of State is not liable for the publication of an act done in respect to a military officer in pursuance of government orders and regulations applying to military service.

I might decide this point upon the narrower ground that there is no averment that the defendant personally ordered, sanctioned, or knew of the publication in the "Gazette," and that the statement in the order itself that it is under the authority of [\*464] Government, it \* being signed "Commander-in-Chief," is no sufficient allegation that the publication was the act of the defendant; but I prefer deciding it upon the broader ground, as, if I am right as to that, great expense may be saved to the plaintiff. I will add that, if I am right as to the first point, viz., that the act of removal is not within the cognizance of this Court, it seems to me that the publication in the official Government record of that Act, being obviously necessary for the information of those whom it may concern, is in my judgment also not within the competence of this Court.

I am of opinion that the statement of claim discloses no cause of action, and that the demurrer must be allowed.

*Judgment for the defendant.*

#### ENGLISH NOTES.

The principle stated in the rule is well settled. The rule is applicable as well to civil servants as to military or naval officers. *Shenton v. Smith* (P. C. 1895), 1895, A. C. 229; 64 L. J. P. C. 119, 72 L. T. 130, 43 W. R. 637; *Dunn v. Reg.* (C. A. 13 Dec. 1895), 1896, 1 Q. B. 116, 73 L. T. 695.

*Shenton v. Smith*, *supra*, was a case in which the respondent had been gazetted, without any special contract, to act temporarily as medical officer during the absence of the holder of the office, who had been granted leave of absence. Before the leave expired, the Government of Western Australia, which was then a Crown Colony, dismissed the respondent. The Privy Council held that the respondent had no cause of action. The following passages from the judgment of the Board, embody the principles applicable to this class of cases. "It has been argued at the bar that a Colonial Government stands on a different footing from the Crown in England, with respect to obligations towards persons with whom it has dealings. Their Lordships do not go into the cases cited for proof of that proposition, for they are quite different from this case, and neither principle nor authority has been adduced to

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show that in the employment and dismissal of public servants a Colonial Government stands on a different footing from the Home Government. It appears to their Lordships that the proper grounds of decision in this case have been expressed by STONE, J., in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a lawsuit, but by an appeal of an official or political kind." Their Lordships then disposed of an argument which had been rested upon certain regulations issued by the Crown, through the Colonial Office, to the governments of the various Crown Colonies of the Empire. "On the face of them it is pointed out (see regulation 64) to be the general rule in Crown Colonies that offices are holden during Her Majesty's pleasure. The difficulty of dismissing servants whose continuance in office is detrimental to the state would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government to whom the regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the regulations is amenable, not to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case."

An attempt was unsuccessfully made to get out of the rule in *Reg. v. Secretary of State for War* (C. A. 1891), 1891, 2 Q. B. 326, 60 L. J. Q. B. 457, 64 L. T. 764, 40 W. R. 5. The applicant was a retired officer in the army. The conditions of service which were in force when he entered the army were changed by the royal warrants which followed upon the abolition of purchase in the army. The applicant had commenced an action by petition of right to recover the amount of compensation to which he alleged he was entitled for the loss incurred by the operation of the warrants. The Attorney General demurred to this petition on the ground that it did not disclose any contract between Her Majesty and the suppliant, nor any engagement or service of the suppliant, otherwise than at Her Majesty's pleasure, nor any right of the suppliant to any sum of money, emolument, or allowance, or any claim otherwise than on Her Majesty's bounty. This demurrer was allowed by MATHEW, J., and in the Court of Appeal. The next move was to apply for a *mandamus* to the Secretary of State for War to compel him to pay what was alleged to be a just equivalent for the loss



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sustained by the operation of the royal warrants. This application was refused. In the present case an order *nisi* was obtained calling upon the Secretary of State to show cause why a writ of *mandamus* should not issue to him commanding him to consider and determine, under the terms of a royal warrant issued in 1884, what was a just equivalent for any loss the applicant might have incurred by the operations of certain warrants. This application was refused upon the ground that no legal duty in relation to officers and soldiers in the army was imposed on the Secretary of State at the common law or by statute.

The Lords of Appeal in Ordinary hold office during good behaviour: Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 6; and Judges of the Supreme Court hold their offices on the like condition: Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5. From the provisions of the last section is excepted the Lord Chancellor. The Lord Chancellor, although removable at pleasure, is entitled to a pension: 2 & 3 Will. IV. c. III. The Lords of Appeal and the Judges of the Supreme Court are removable on the address of both Houses of Parliament. Judicature Act, 1875, s. 5.

The paid members of the Judicial Committee of the Privy Council hold office on the same terms as Lords of Appeal: Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 14.

Among the lower judicial officers County Court Judges are removable by the Lord Chancellor for inability or misbehaviour: County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 15. Recorders hold office during good behaviour: Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50) s. 163.

Metropolitan Police Magistrates hold office during pleasure: 10 Geo. IV. c. 44, s. 1, and 2 & 3 Vict. c. 71, s. 1. Stipendiary Magistrates in other towns also hold office during pleasure: 26 & 27 Vict. c. 97, s. 3.

Persons who have served political offices under the Crown in Parliament have been provided with pensions under the provisions of the Political Offices Pension Act, 1869 (32 & 33 Vict. c. 60). This statute repeals, but substantially reproduces, earlier provisions having the like object.

#### AMERICAN NOTES.

"An office in this country is not property, nor are the prospective fees of an office the property of the incumbent. *Conner v. The Mayor*, 1 Selden (New York), 285. . . . The legislature may diminish or abolish the fees at pleasure, or may render it a salaried office. . . . The right to fees, or compensation, does not grow out of any contract between the Government and the officer, but arises from the rendition of the services. *Dartmouth College v. Woodward*, 4 Wheaton (U. S. Sup. Ct.), 627; *People v. Warner*, 7 Hill (New York), 81; s. c., 2 Denio, 272. . . . Both the office itself and the compensation, upon general principles of law, are entirely within the control of the Govern-

No. 10. — *In re Pering*. — Rule.

ment, to diminish, increase, or abolish." *Smith v. The Mayor*, 37 New York, 518. This is the general doctrine as to statutory offices in this country. *State v. Davis*, 44 Missouri, 129; *Prince v. Skillin*, 71 Maine, 361; 36 Am. Rep. 325; *State v. Hawkins*, 44 Ohio State, 109; *Beebe v. Robinson*, 52 Alabama, 66; *State v. Douglass*, 26 Wisconsin, 428; 7 Am. Rep. 87; *Commonwealth v. Bacon*, 6 Sergeant & Rawle (Pennsylvania), 321; *Butler v. Pennsylvania*, 10 Howard (U. S. Sup. Ct.), 402. In the last case the Court held that appointment to office was not a "contract" the impairment of the obligation of which is forbidden by the Federal Constitution.

An office provided for by Constitution is held, in North Carolina, to be property not subject to legislative interference. *King v. Hunter*, 65 North Carolina, 603; 6 Am. Rep. 754. In all the other States the legislature may do what it pleases with such offices, unless expressly restrained by the Constitution, an office not being regarded as property nor the subject of contract in any sense. Throop on Public Officers, sect. 19, citing many cases.

See Mechem on Public Officers, sects. 463, 464, 465: "Where then an office is created by statute, it may, in the absence of constitutional prohibition, be entirely abolished, or its term may be increased or diminished, or the manner of filling it may be changed, or its compensation may be altered, or its duties may be diminished or increased, at the will of the legislature at any time, even though done during the term for which the then incumbent was elected or appointed. So the legislature may declare the office vacant, or may transfer its duties to another officer, although the effect may be to remove the officer in the middle of his term, or to abolish his office by leaving it devoid of duties." Citing cases *supra*, and *State v. Davis*, 44 Missouri, 129; *Taft v. Adams*, 3 Gray (Mass.), 126; *Butler v. Pennsylvania*, 10 Howard (United States), 402; *State ex rel. Bunting v. Gales*, 77 North Carolina, 283; *Denver v. Hobart*, 10 Nevada, 28; *Attorney-General v. Squires*, 14 California, 12.

SECTION IV. — *Proceedings against the Crown*.

## No. 10. — IN RE PERING.

(EX. 1837.)

## RULE.

THE Crown, through the Lord Chancellor, is still entitled, upon petition of right, to name the Court in which the proceedings shall be had. Prior to the Petition of Right Act 1860 (23 & 24 Vict. c. 34) the general indorsement "Let right be done" did not entitle the petitioner to choose his Court.

## In re Pering.

2 Meeson & Welsby 873-878 (s. c. 5 D. P. C. 750; M. & H. 223).

*Petition of Right. — Procedure.*

[873] A petition of right was addressed to the King "in his Court of Exchequer," and concluded with a prayer that he would be pleased to order that right be done, and to indorse his royal declaration thereon to that effect; and that he would refer the petition, with such order and declaration thereon, "to the Barons of his Majesty's Exchequer." The king indorsed the petition, "Let right be done." *Held*, that this Court had no jurisdiction to adjudicate upon the matter.

This was a petition of right presented by Mr. Richard Pering, addressed "To the King's Most Excellent Majesty, in his Court of Exchequer at Westminster," praying for compensation for the use of his patents for the improvement of anchors, and for other services rendered at his Majesty's dockyards. It appeared from the petition, that Mr. Pering had held the successive offices of Store-keeper in the dockyards at Sheerness and Woolwich, and Clerk of the Cheque in the dockyard at Plymouth, from the year 1782 to the year 1821. In July, 1813, he obtained a patent for an invention, by which anchors were enabled to be made of much greater strength, relatively to their weight, than any anchors previously made; with the usual reservation in favour of his Majesty. Satisfactory trials having been made of the strength of the anchors, the result was, that the Lords Commissioners of the Admiralty issued an order, on the 20th November, 1815, that anchors should be made on Mr. Pering's principle. Anchors were accordingly made for the public service according to the patent, and under Mr. [\*874] Pering's instruction; for which use of his patent, and \* for his labour, time, and expense in enabling his Majesty's navy to have the benefit of it, Mr. Pering was, by an Admiralty Order of the 21st of June, 1821, allowed the sum of £1500 as a remuneration. In the year 1822, Mr. Pering, having served forty years, was allowed to retire upon a pension of £450 per annum, calculated in the usual way according to the amount of salary and period of service. After his retirement, he continued to make suggestions of improvements in the construction of anchors; and in the year 1830, having invented an additional improvement in their formation, obtained a patent containing a proviso for making the

same void if he, Mr. Pering, his executors, administrators, or assigns, should not supply or cause to be supplied, for his Majesty's service, all such articles of the said invention as he or they should be required to supply, in such manner, and at such times, and at and upon such reasonable prices and terms, as should be settled for that purpose by the Commissioners of his Majesty's Navy for the time being. In August, 1831, a trial of an anchor constructed on this improved principle was made under the order of the Commissioners, and a favourable report having been made, Mr. Pering, at the request of the Commissioners of the Navy, drew up instructions for the guidance of smiths at the dockyards in making the improved anchor, and on that occasion he was occupied three months, and incurred considerable expense, in superintending the construction of the anchors, and in journeying to and from Plymouth and in staying at that place; but had neither received his expenses nor any remuneration. Various applications had been made to the Board and to the First Lord of the Admiralty, but without effect. Mr. Pering afterwards applied to the Court of King's Bench for a *mandamus* to the Lords of the Admiralty, commanding them to fix a reasonable price to be paid to him for the use of his patent, but the rule was \* refused.<sup>1</sup> The [\* 875] present petition, after stating the facts, prayed that his Majesty would be graciously pleased to order that right be done in this matter, and to indorse his royal declaration thereon to that effect; and to refer the petition, with such royal order and declaration thereon, to the Barons of his Majesty's Exchequer. The King's indorsement (written in the margin opposite the body of the petition) was, "Let right be done." There was also the following memorandum at the foot of the petition, by the Secretary of State for the Home Department: "His Majesty is pleased to refer this petition to the Attorney-General to consider thereof, and to take the necessary steps thereon. J. Russell."

The Attorney-General objected that this Court had no authority or jurisdiction in a matter of this nature. The indorsement refers this petition to the Attorney-General, who is to consider of it, and either to confess or deny the facts stated in it; and unless he confesses it, there ought to be an inquisition to ascertain whether the suggestions are true or not. [Lord ABINGER, C. B. What has this Court to do with a petition of right which is referred to the

<sup>1</sup> See *Ex parte Pering*, 6 Nev. & Man. 472.



Attorney-General? ALDERSON, B. It should seem as if it ought to be referred to the Chancellor. In Com. Dig. tit. Prerogative, D 80, it is laid down, that “upon petition out of Parliament, or there (if not pursued by a statute), it shall be indorsed by the King, *Soit droit fait*, and then delivered to the Chancellor.” It also appears, that it may be indorsed by the King to the King’s Bench or Common Pleas.] Lord Keeper SOMERS goes much at length into the course of proceedings, in his judgment in *The Bankers’ Case*, How. State Trials, Vol. 14, p. 59, edit. 1816. He says, “The manner of answering petitions to the person of the King [\* 876] was very \* various, which variety did sometimes arise from the conclusion of the party’s petition, sometimes from the nature of the thing, and sometimes from favour to the person, and according as the indorsement was the party was sent into Chancery or the other Courts. If the indorsement was general, *Soit droit fait al partie*, it must be delivered to the Chancellor of England, and then a commission was to go to find the right of the party, and that being found, so that there was a record for him, thus warranted, he is let in to interplead with the King. But if the indorsement was special, then the proceeding was to be according to the indorsement in any other Court. This is fully explained by Stamford in his Treatise of the Prerogative, cap. 22.” In the present case the petition is, that his Majesty will be graciously pleased to order that right be done in this matter, and to indorse his royal declaration thereon to that effect, “and to refer the petition, with such royal order and declaration thereon, to the Barons of his Majesty’s Exchequer.” The latter part of this petition had not been complied with.

The Court then called upon

W. H. Watson, who appeared for the petitioner.—A petition of right lies to any of the Courts at Westminster. [Lord ABINGER, C. B. The King may refer it to any of the Courts: for instance, upon a matter touching real property, he may refer it to the Court of Common Pleas; upon a point of criminal jurisdiction, to the King’s Bench; or upon a matter relating to the revenue, to this Court.] This petition was presented to the King “in his Court of Exchequer at Westminster.” [Lord ABINGER, C. B. Is there any precedent of such a petition? The presenting the petition to the King in his Court of Exchequer, cannot give this Court jurisdiction.] The petition prays the King to refer it “to the

Barons of his Majesty's \* Exchequer," and the indorsement [\* 877] by the King is, "Let right be done." [Lord ABINGER, C. B. But as to the mode of doing it, he requires the advice of the Attorney-General. When the King says, "Let right be done," it means in the Court of Chancery.] The authorities show that that is where the petition is general, not where it is special. Where the petition prays that right be done in the Exchequer, and the King indorses it, "Let right be done," the right is to be done in the Exchequer. [ALDERSON, B. The King does not say, "Let right be done in his Court of Exchequer." The authorities seem to say, that unless the King indorses it to the Exchequer, it is in the Court of Chancery; *Soit droit fait* is in the Chancery. Lord ABINGER, C. B. Unless the King specially indorses it to this Court, we have no jurisdiction.] This Court adjudicated upon the petition in *Sir Henry Nevil's Case*, Plowden, 377. [ALDERSON, B. How does it appear that there was a petition of right in that case?] In a note at the end of the case, the learned reporter says, "From this record may be seen the order and form how one who has a rent out of the land in the King's hands, shall make his petition to the Court of Exchequer, to come at it without making petition to the King's person, and also how he shall have the judgment executed; for it is not the course to command by parol that payment be made, but a writ in the form affixed shall be awarded by the barons." [Lord ABINGER, C. B. This is not a petition to the Court of Exchequer, but to the King in person.] In *Sir Thomas Wroth's Case*, Plowden, 452, this Court gave judgment upon a petition by him for the payment of the arrears of an annuity granted to him for his life by King Henry VIII., by patent. [BOLLAND, B. That was not the case of a petition of right.] In Manning's Exchequer Revenue Practice, page 84, it is said, "Where a right is sought to be established against the Crown itself, the course prescribed by the common law is to address a petition to the King in one of his Courts \* of Record, pray- [\* 878] ing that the conflicting claims of the Crown and the petitioner may be duly examined. As the prayer of this petition is grantable *ex debito justitiæ*, it is called a petition of right, and is in the nature of an action against the King, or of a writ of right for the party, though chattels, real or personal, debts, or unliquidated damages, may be recovered under it;" — for which passage numerous authorities are cited. In Viner's Abr., tit. Prerogative of

the King, Q 13. pl. 2, it is said, "The justices of B. R. may proceed to the examination of the matter by themselves, if the petition contains that the King commands them to examine it, and this without original out of Chancery." In this case the King says, "Let right be done," which must be taken to be according to the terms of the petition, which prays that right may be done, and that it be referred to the Barons of the Exchequer.

LORD ABINGER, C. B. If one single precedent had been cited to show that upon the general indorsement, "Let right be done," this Court had proceeded to adjudicate upon the petition, I should have yielded to the argument; but though there must have been various petitions of this sort, none has been shown, and we have no authority to warrant our proceeding in the present case. If the King had indorsed the petition, "Let right be done in the Court of Exchequer," we should have had authority to adjudicate upon it; but until such an indorsement is made, we think we have no authority to interfere.

BOLLAND, B., concurred.

ALDERSON, B. In Com. Dig. Prerogative, D. 80, it is laid down, that if a petition have a special conclusion that the King command his justices of a particular Court, and it be indorsed in accordance, it shall be pursued there. In this case the King has not indorsed it in accordance with the special conclusion of this petition.

#### ENGLISH NOTES.

The following is a synopsis of the procedure under the Petition of Right Act, 1860 (23 & 24 Vict. c. 34). A slight change in language has been rendered necessary by the recent changes in the constitution of the Courts by the Judicature Acts. The petition may be intituled in the Chancery Division or Queen's Bench Division of the High Court, and if intituled in the Queen's Bench Division must state the venue for the trial of the petition. The petition must state the christian and surname and usual place of abode of the suppliant, and of his attorney if any. The petition must be to the effect of the form (No. 1) in the Schedule to the Act, and should set forth the facts upon which the suppliant relies. The petition must be signed by the suppliant, his counsel or solicitor. The petition is then left with the Secretary of State for the Home Department, for Her Majesty's fiat. If the fiat is given, a copy of the petition and fiat is left at the office of the Solicitor to the Treasury. The petition must, however, previously be endorsed as provided by form (No. 2) in the Schedule to the Act. The proceedings

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are then had in the Division in which the petition is intituled, or in such other Court as the Lord Chancellor directs. The Lord Chancellor is also empowered to change the Court or the venue, on the application of the Attorney General, or of the suppliant.

The procedure, after the action is instituted, is analogous to the practice between subject and subject. Section 7 of the Act is as follows: "So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error, in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act." This enactment confirms the case of *De Bode v. Reg.* (Ex. Ch. 1848), 13 Q. B. 364, 14 Jur. 970. The judgment of the Court of Queen's Bench had gone against the Baron De Bode, who brought an appeal to the Court of Exchequer Chamber, as constituted by the 11 Geo. IV. and 1 Will. IV. c. 70, s. 8. It was objected on behalf of the Crown, that the writ of error should have been taken to the House of Lords, as the statute did not bind the Crown. The Court, however, overruled the objection, as it was not shown that the Crown claimed any prerogative right which was prejudiced by the procedure adopted. Where, however, the Crown possesses, in virtue of its prerogative, a right not enjoyed by a subject, the Petition of Right Act, 1860, was held not to have affected the former question. *Tobin v. Reg.* (1863) 14 C. B. (N. S.) 505, 32 L. J. C. P. 216. It was held in that case that the Crown was entitled to plead double, or to plead and demur without leave of the Court.

Discovery cannot be obtained against the Crown. *Tomline v. Reg.* (C. A. 1879), 4 Ex. D. 252, 48 L. J. Ex. 453, 40 L. T. 542, 27 W. R. 651. The Crown may, however, obtain discovery from the subject. *Thomas v. Reg.* (1874), L. R., 10 Q. B. 44, 44 L. J. Q. B. 17, 33 W. R. 345. This construction allows the Crown to take advantage of a statute, by which it is not bound, not being named in it, and is in conformity with the rule in *Rex v. Davies*, No. 6, p. 201, *ante* (5 T. R. 626, 2 R. R. 683). It must also be recollected that the Crown may object to produce documents on the ground that the production would be injurious to the



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public service. *Smith v. East India Company* (1841), 1 Ph. 50, 11 L. J. Ch. 71; *Hughes v. Vargas* (C. A. 1893), 9 R. 661.

The Crown, it seems, cannot plead the Statute of Limitations, 21 Jac. I. c. 16, to a petition of right. *Rustomjee v. Reg.* (1876), 1 Q. B. D. 487, 45 L. J. Q. B. 249, 34 L. T. 278, 24 W. R. 428. Judgment, however, passed for Crown upon a demurrer to the petition; and was affirmed in the Court of Appeal, where the point as to the Statute of Limitations was not raised (1876). 2 Q. B. D. 69, 46 L. J. Q. B. 238, 36 L. T. 190, 25 W. R. 333.

Costs may be recovered by and against the Crown on a petition of right: Petition of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 11 & 12.

Costs in other Crown suits or informations are regulated by the Crown Suits Act, 1855 (18 & 19 Vict. c. 90). A court of quarter sessions cannot award costs against the Crown on an appeal to them from the decision of justices on an information by an excise officer. *Reg. v. Beadle* (1857), 7 El. & Bl. 492, 26 L. J. M. C. 111.

A petition of right will not lie respecting lands in a Colony alleged to be vested in the Crown under a local Act of Parliament. *Holmes v. Reg.* (1861), 2 Johns. & H. 527, 31 L. J. Ch. 58, 8 Jur. (n. s.) 76, 5 L. T. n. s. 548, 10 W. R. 39. A petition of right lies for damages for a breach of contract. *Windsor and Annapolis Railway Company v. Reg.* (P. C. 1886), 11 Ap. Cas. 607, 55 L. J. P. C. 41, 55 L. T. 271.

A petition of right will not lie to enforce a trust, where the Crown is trustee. "That has been held as long ago as the time of Richard III., who, as Duke of Gloucester, had several trusts which on his becoming King were transferred for that very cause." *Per* BLACKBURN, J. *Rustomjee v. Reg.* (1876), 45 L. J. Q. B. at p. 253. The transfer was effected by Act of Parliament, 1 Rich. III. c. 5.

An action will not lie against a servant of the Crown, nor against persons in his employment, for an act done in the performance of public duties. *Reg. v. Lords Commissioners of the Treasury*, No. 19 of "Action." 1 R. C. 802.

## AMERICAN NOTES.

There is no doctrine corresponding to that of the principal case recognized in this country. The Government of the United States submits to suits by its citizens in certain cases, for the determination of which a Court of Claims has been provided. There is a similar Court in the State of New York, and possibly in other States.

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 No. 1. — **Mounsey v. Ismay**, 34 L. J. Ex. 52. — Rule.
 

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## CUSTOM.

As to particular customs or usages of trade, see notes to *Calder v. Dobell* (No. 17 of "Agency"), 2 R. C. pp. 468 *et seq.*, and see note to *Hussey v. Horne-Payne* (No. 15 of "Contract"), 6 R. C. 169, 170.

As to notorious custom to exclude reputed ownership, see *Ex parte Watkins* (No. 6 of "Bankruptcy and Notes"), 4 R. C. pp. 64 *et seq.*

As to usage to make instrument negotiable, see "Bond" (negotiable), 5 R. C. 197 *et seq.*

No. 1. — **MOUNSEY v. ISMAY.**

(EX. 1865.)

No 2. — **BRYANT v. FOOT.**

(EX. CH. 1868.)

## RULE.

To be good, a custom must have existed from the time of legal memory, or the commencement of the reign of Richard I. (1189), except in those cases where the Prescription Act, 1832 (2 & 3 Will. IV. c. 71), applies.

**Mounsey v. Ismay.**

34 L. J. Ex. 52-56 (s. c. 3 Hurl. &amp; Colt. 486; 11 Jur. N. S. 141).

*Custom. — Easement. — Prescription.*

A claim, by custom, for all the freemen and citizens of a neighbouring [52] city to run horse-races over certain land on Ascension Day in every year, is not a claim to an easement within the meaning of the 2d section of the Prescription Act (2 & 3 Will. IV. c. 71).

Trespass for breaking and entering a certain close of the plaintiff abutting, &c., and breaking down and prostrating and destroying the fences of the plaintiff and belonging to the said close, and divers posts and rails then standing and being in and upon the said close and affixed thereto, and also prostrating, levelling, and destroying a bank then erected and being upon and being parcel of the said close, and pulling up and destroying the thorns there growing.

Pleas, under the Prescription Act (2 & 3 Will. IV. c. 71, s. 2) which are sufficiently stated in the judgment of the Court.

[54] Demurrers to all the pleas, and joinder in the demurrers.

By way of further replication to all the above pleas, the plaintiff replied that there was not before or at the commencement of the period of years before this suit in each of these several pleas respectively mentioned, and during which the right is alleged to have been enjoyed as therein mentioned, any valid or legal custom such as is therein mentioned.

Demurrer to the replication, and joinder in demurrer.

C. Hutton (Jan. 18), in support of the plaintiff's demurrers. — It has been decided that this is a good custom at common law. See *Mounsey v. Ismay*, 32 L. J. Ex. 94; 1 H. & C. 729. The question here is, is it valid under the Prescription Act? The words in the 1st and 2nd sections are, "no claim which may be lawfully made at the common law, by custom, prescription, or grant." The defendant cannot claim this right by prescription, because the free-men of a ville are a fluctuating body, and a grant to them as such would be void. They can then only claim it by custom. What is its meaning in this Act? It is clear that in the 1st section, the word "custom" is applied only to the case of copyholders claiming a profit *à prendre* against their lord. *Constable v. Nicholson*, No. 6, p. 337, *post*, 32, L. J. C. P. 240; 14 C. B. (N. S.) 230. The same meaning must be given to the word "custom" in the 2nd section that it bears in the first; if it had any other meaning in the 1st section, it would be subversive of the rule of common law, which allows a profit *à prendre* to be claimed only by prescription, and not by custom. Copyholders do not claim against their lord by prescription, as they are only tenants at will; therefore, where a right to take a profit *à prendre* exists within a manor, it can only be claimed by custom. There is a distinction between a custom and a prescription. Co. Lit. 113 b., *Gateward's case*, 6 Co. Rep. 59 b., and *Blowett v. Tregonning*, 3 Ad. & E. 554; 3 L. J. (N. S.) K. B. 223. The 2nd section only applies to easements that are claimed by a *fee* estate. *Bailey v. Stercus*, 31 L. J. C. P. 226; 12 C. B. (N. S.) 91. WILLES, J., in that case, says, "There is no doubt that easements in gross could not be claimed by an occupier, as such, under the Prescription Act; and there is also no doubt that no right of that kind could be acquired by him under that Act, by a user of twenty, thirty, or sixty years, either as an ease-

No. 1. — *Mounsey v. Ismay*, 34 L. J. Ex. 54, 55.

ment, or as a profit *à prendre*, except it is capable of being annexed to land within the rule I have already mentioned." The 5th section refers to the mode of pleading, as well by the plaintiff as by the defendant. With regard to the former, the difficulty does not occur, but with regard to defendants, if the 5th section applies to prescription, to a right in gross, why is the section limited to "the enjoyment" by the occupiers of the tenement, in respect whereof the right is claimed?

[CHANNELL, B. The Legislature, in passing the statute has two objects in view: first, to shorten the time of prescription in certain cases, not in all cases; secondly, to abolish the prescription in the *que* estate.]

Next, this is not an easement, but a mere licence.

Crompton, in support of the pleas. — [He was requested by the Court to confine his argument to whether the alleged right was an easement.] In Gale on Easements, p. 5, an easement is defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not to do something on his own land, for the advantage of the dominant owner. But the late editor, at p. 10, note (d), and p. 12, note (d), contends an easement in gross may exist. It is quite clear that a plea of prescription at common law for a profit *à prendre* is valid, *Welcome v. Upton*, 6 M. & W. 536; 9 L. J. (N.S.) Ex. 154; and if such a claim be good, \* why should not an easement [\*55] in gross be equally valid? A grant of a right of way to a man and his heirs may exist irrespective of any estate in land.

[MARTIN, B. Is a right to go for mere pleasure into a field to hold horse-races the subject of a grant? Can a man grant to A. and his heirs the right to walk in his park? Would it pass it to his heirs? Is it not a mere licence? PIGOTT, B., referred to *Dyer v. Lady James Hay*, 1 Macqueen's Scotch Appeals, 305.]

C. Hutton was heard in reply.

*Cur. adv. vult.*

MARTIN, B., (Jan. 25) delivered the judgment of the Court.<sup>1</sup> — This is a demurrer to pleas. The declaration is trespass for breaking and entering a close, and breaking down the fences, &c. There are several pleas, which are demurred to: they are all grounded upon the Prescription Act, 2 & 3 Will. IV. c. 71. The first alleged



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that for the full period of twenty years next before the suit, on a certain day in every year, namely, Ascension Day, or Holy Thursday, horse-races had been of right, &c., holden on a certain piece of land, whereof the close in which, &c., was parcel, and for the same full period of twenty years the freemen of the city of Carlisle had of right, and without interruption, enjoyed a custom that they should enter upon the said piece of land for the purpose of holding horse-races thereon, and the said freemen had, during all that time, used, &c. The pleas proceeded to justify the trespass by virtue of the custom, in the usual manner. The next plea was the same, alleging the user of the custom for forty years. The next plea was similar to the first above demurred to, save that the right was alleged to be in the citizens of Carlisle. The next was similar to the last, save that the user was alleged to be for forty years. The four pleas following were substantially the same as the preceding; and one objection only was made to all of them, viz, that the custom alleged was not within the Prescription Act. Some short time ago this custom was the subject-matter of discussion before us. It was then pleaded as a custom at common law, and we were of opinion that it was a good custom. (See 1 H. & C. 729; 32 L. J. Ex. 94.) The present pleas have been added since. It is perfectly clear that such a right as is here set up can only exist by custom; a grant of such right to the freemen of Carlisle or the citizens of Carlisle would be void. Such indeterminate bodies as the freemen of a city or the citizens of a city, not being themselves a corporation, are incapable of being grantees; and there is probably another objection to it, as not being a legal subject of grant, but only a licence. The question, therefore, really comes to this: assuming that the owner of this close had forty-one years before the commencement of this suit, by parol, granted to or conferred upon the freemen of Carlisle or the citizens of Carlisle this right, and that they had during the forty years preceding the suit, in fact, exercised it as a right and without interruption, would the operation of the 2nd section of the statute render it absolute and indefeasible, notwithstanding that the origin of it could be clearly and satisfactorily proved, and that it began shortly before the commencement of the period of forty years? The occasion of the enactment of the Prescription Act is well known. It had been long established that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign

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of Richard the First, or in other words of a right by prescription, except proof was given of an impossibility of the existence of a right from that period; and a very common mode of defeating such a right was proof of a unity of possession since the time of legal memory. To meet this the grant by lost deed was invented, but in progress of time a difficulty arose in requiring a jury to find upon their oaths that a deed had been executed which every one knew never existed; hence the Prescription Act. The 1st section of the act relates to profits *à prendre*, and the respective periods therein mentioned are thirty and sixty years. The present case is not alleged to be within it. The pleas are all grounded on the 2nd, which enacts that no claim which may be lawfully made at common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or to the use of any water to be enjoyed upon any land, &c., when such way or other matter shall have been actually \*enjoyed by any person claiming right thereto without interruption for twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; and when such way or other matter should have been so enjoyed for the period of forty years, the right thereto should be deemed absolute and indefeasible, unless it shall appear that it was enjoyed by a consent or agreement by deed or writing. The question which has been argued before us, and which is the true one, is whether a custom for the freemen or citizens of Carlisle, upon Ascension Day, to enter upon another man's land for the purpose of holding horse-races there, is an easement within the 2nd section. To be so, it must be within the words "custom, prescription, or grant, to a way or other easement, or to a watercourse, or to the use of any water to be enjoyed upon land of another;" and we think it is not. In the first place, we do not think that this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted is in the *Termes de la Ley*, and it is "a privilege that one neighbour hath of another by writing or prescription, without profit; as a way or sink through his land." In this definition custom is not mentioned; prescription is, and it therefore seems to point to a privilege belonging to an individual, not a custom which appertains to many as a class. Again in Mr. Gale's book, p. 5, an easement is defined; a very great number of authorities are collected, and it is stated in the most explicit

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terms that to constitute an easement there must be two tenements, a dominant one to which the right belongs, and a servient one upon which the obligation is imposed. We further think that the 2nd section itself points to a right belonging to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross wholly irrespective of land; for to obtain the benefit conferred by the 2nd section, it must be enjoyed by a person claiming right thereto for the full period of twenty years or forty years. We are not aware of any case or expression of opinion by any Judge contrary to this, but the 5th section of the Act has been relied on as establishing it. This section relates to pleadings, and enacts that in all pleadings to actions of trespass and other pleadings wherein before the passing of the Act it would have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupier of a tenement in respect whereof the same is claimed, &c. It has been said that this shows that an easement within the protection of the statute must be an easement belonging to a dominant tenement; we think it affords an argument in illustration as to what the Legislature contemplated; but after what fell from this Court in *Welcome v. Upton*, — 5 M. & W. 398, and the same case 6 M. & W. 536, — and a note of the late Mr. Henry Willes, in p. 152 of the edition of Gale on Easements, edited by him, we are not prepared to say the statute may not extend to easements in gross; although it is to be observed that all which Lord WENSLEYDALE says in the last report of the case (6 M. & W. pp. 542–543) is, “we might be disposed to think that the present case (an alleged easement in gross) is within the equity of the statute;” and he goes on to add, that the question was then immaterial. But, however this may be, we are of opinion that to bring the right within the term “easement” in the 2nd section, it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act, and we are satisfied that it was never in the contemplation of Lord TEXTERDEN, who framed it (see *per* Lord WENSLEYDALE, 5 M. & W. 404), to include within the Act such customary rights as entering land to enjoy rural sports, as in *Millechamp v. Johnson*, Willes, 205, n., or to

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dance upon a green, as in *Abbot v. Weekly*, 1 Levinz, 176, by analogy to which we held this alleged customary right to run horse-races a lawful one at common law (*Mounsey v. Ismay*, 32 L. J. Ex. 94; 1 H. & C. 729); what we think he contemplated were incorporeal rights incident and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure. In our opinion, therefore, the pleas demurred to are bad, and our judgment is for the plaintiff.

*Judgment for the plaintiff.*

### **Bryant v. Foot.**

36 L. J. Q. B. 65-67; 37 L. J. Q. B. 217-228 (s. c. L. R., 3 Q. B. 497; 18 L. T. 587; 16 W. R. 808; 9 B. & S. 444).

#### *Custom. — Marriage Fee. — Rankness.*

The rector of a parish claimed a fee of 13s., viz., 10s. for himself and [217] 3s. for his clerk, on the celebration of every marriage in the parish church. From the year 1808 to 1854 this fee had been almost invariably paid. *Held*, by the majority of the Court, KELLY, C. B., MARTIN, B., CHANNELL, B., BRAMWELL, B., and BYLES, J., that although a fee received as far back as living memory went ought to be presumed to have had a legal origin unless the contrary were proved, yet that this contrary proof was afforded by the difference in the value of money in 1189 and the present time, of which the Court would take judicial notice, as it was impossible that such a fee as 13s. could have been payable as of right in the reign of Richard the First, and that the doctrine of rankness was not confined to cases of *modus*. *Held*, also, by the same judges, that the evidence in the case would not support a claim to a reasonable (and so varying) fee.

*Held*, by BRAMWELL, B. and BYLES, J., that assuming that the fee had been immemorially paid it could only be enforced if it were reasonable in amount, and that a fee of 13s. was not reasonable at the present day, and much less so before the time of legal memory.

*Held*, by KEATING, J., dissenting from the judgment of the Court, that looking at the amount of the fee and the time during which it had been paid without objection, it was a reasonable one, and that it ought to be presumed it was immemorial, and that what is known of the value of money in the reign of Richard the First cannot be relied upon as sufficient evidence to defeat the presumption arising from long-continued usage.

Error from a decision of the Court of Queen's Bench, upon a special case which was as follows: —

1. This was an issue directed by BLACK- [36 L. J. Q. B. 65] BURN, J., to try the question, whether 13s. (or



10s. for the rector and 3s. for the clerk) was the legal fee or accustomed duty payable on the marriage of a man and woman in the parish church of the parish of Horton, in the county of Buckingham, or whether there was on such marriage any legal or accustomed fee, and, if any, what was the amount thereof.

[\* 66] \* 2. The issue came on to be tried at Guildhall, on the 7th of July, 1863, before the LORD CHIEF JUSTICE and a special jury, when it was ordered by the Court, by the consent of the parties, that the jury should be discharged, and that the facts should be ascertained and put in the form of a special case by an arbitrator for the opinion of this Court.

3. The facts of the case are as follows: As far back as the year 1808, and from that year down to the year 1854, the fee paid on the marriage of a man and woman in the church (except in the cases hereinafter specified), exclusive of the fee paid as hereinafter mentioned for the publication of banns, was either 13s. 6d. or 13s. But (as will appear from the summary of the evidence hereinafter set forth) the fee most frequently paid on such marriages during the above period was 13s., that is, 10s. for the rector and 3s. for the clerk.

4. The following is the summary of the evidence above referred to: The defendant gave evidence of thirty marriages which had been solemnized in the church during the period from 1808 to 1854; and he proved that in twenty-one of the said thirty cases (which had happened in the years 1814, 1822, 1823, 1827, 1829, 1833, 1843, 1844, 1846, 1849 and 1850 respectively) the fees paid were 13s., that is to say, 10s. for the rector and 3s. for the clerk, and that in nineteen of the said twenty-one cases 3s. had been paid for the banns; that in six of the said thirty cases (which had happened in the years 1808, 1827, 1828, 1833, 1837 and 1848 respectively) the fees paid were 13s. 6d., and that in three of the said six cases 2s. 6d. had been paid for the banns; that in two of the said thirty cases (one of which happened in the year 1828, and the other in the year 1840) the fees paid were 13s. 6d., and 3s. for the banns; and that in one of the said thirty cases (which happened in the year 1828) the fees paid were 12s. 6d., and 3s. 6d. for the banns. And the plaintiff proved the following cases: viz., one case in 1815, in which the fees paid were 10s. 6d., and 3s. for the banns; one in 1830, in which the evidence left it doubtful whether the fees paid were 13s., and 3s. for the banns, or 13s. 6d. and 2s.

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6*d.* for the banns ; one in 1834, in which the fees paid were 16*s.* 6*d.*, and 3*s.* for the banns ; one in 1847, in which the fees paid were 17*s.* 6*d.*, and 3*s.* for the banns.

5. In five of the thirty cases proved by the defendant there was not any evidence as to what sums had been paid for the banns ; nor did it appear whether, or in what proportions, the money had been divided between the rector and the clerk in any case in which the fee paid on a marriage in the church had been more or less than 13*s.*

6. There was not any evidence as to what fees had been paid on marriages in the church prior to the year 1808.

7. In the year 1849 the Rev. William Brown, who was then and had been for many years rector of the parish, caused to be hung up in the vestry of the church a table of fees, with this heading : “Table of fees to be paid in the parish of Horton, county of Bucks.”

\* And in that table there are, *inter alia*, the following [\*67] entries :—

|  | <i>s.</i> | <i>d.</i> |
|--|-----------|-----------|
| “For a marriage by banns, with certificate of marriage . . . | 10        | 0         |
| For the publication of banns of marriage . . . . .           | 3         | 0         |
| For a certificate of marriage, baptism or burial . . . . .   | 2         | 6”        |

8. In the year 1854 the defendant became rector of the parish ; since he so became rector, up to the present time, thirty-four marriages have been solemnized in the church ; and during all that time the fee paid for a marriage in the church (exclusive of the fee of 3*s.* for publication of banns) has been uniformly 13*s.* (that is), 10*s.* for the rector, and 3*s.* for the clerk.

9. The fees paid on marriages in the church have been sometimes paid during, but most frequently after, the ceremony.

10. Where the parties have applied for a certificate of marriage immediately after the ceremony, it has been invariably given to them free of charge. If it has not been applied for at that time, it has been given on application at any time thereafter on payment of a fee of 2*s.* 6*d.*

11. In the majority of the neighbouring parishes the fees paid on marriages in the churches of those parishes respectively are considerably less than those which have been usually paid on marriages in the parish church of the parish of Horton. But in

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some of the neighbouring parishes the fees are the same, and in one or two they are somewhat larger.

12. By the above-mentioned order of *Nisi Prius*, it was ordered, that the Court should be at liberty to draw all inferences of fact.

13. The question for the opinion of the Court is, how, upon the facts stated, the verdict is to be entered on the above issue.

This case was argued on the 16th and 19th of January, 1866.

[37 L. J. Q. B. 217] The majority of the Court below (COCKBURN, C. J., MELLOR, J., and LUSH, J.) gave judgment against the claim to the fee, holding that the doctrine of rankness applied to the case, and that the amount of the fee prevented any inference that it had existed before the time of legal memory; BLACKBURN, J. dissented, holding that the case was not to be decided as an ordinary question of fact, and that though the amount of the fee was some evidence against the presumption of its antiquity the Court or a jury were bound to find it immemorial, if that was necessary to legalize it, unless the contrary was proved. The defendant thereupon appealed to this Court.

*Coleridge* (*Prideaux* with him), for the defendant.—The judgment of the Court below was wrong, as the fee in question can be shown to be both reasonable and valid. Marriage fees were originally voluntary, but they become due by immemorial custom, and are payable to the parson or vicar of the church where the marriage is solemnized. Several cases on the subject of ancient marriage fees are collected in Burn's Ecclesiastical Law, edition of 1824, p. 268. In five of them the customs were held to be bad. These are *Patten v. Castleman*, 1 Lee's Ecc. Cas. 387, where the fee was claimed in respect of a marriage out of the parish; *Topsall v. Ferrers*, Hob. 175, where the custom relied upon was for a burial fee in respect of a person dying within but buried [\* 218] out of \* the parish; *Burdeaux v. Lancaster*, 1 Salk. 332, a christening fee of 2s. 6d. in a case where the child had been christened at a different church; *Naylor v. Scott*, 2 Ld. Raym. 1558, a custom to pay a fee for churching a woman at the usual time whether she is churched or not; and *Richards v. Dorey*, Willes, 622, a custom for a man who marries by licence in another parish to pay 5s. to the rector of his own parish. The present custom is not open to any of these objections, and ought to be held good, like the custom in *Fuller v. Say*, Willes, 629, to pay 4d. as

an Easter offering. No distinction can be made between the case of the incumbent and his clerk. Burn's Ecclesiastical Law, vol. 3, tit. "Parish Clerk," p. 84; Ayliffe's Parergon, p. 409. The fact that some fees are recoverable is established by the Rubric (and therefore recognized by the Act of Uniformity, 13 & 14 Car. II c. 4.), which directs that the marriage ring shall be laid upon the book with the accustomed duty to the priest and clerk. *Fleetwood v. Finch*, 2 H. Bl. 221, is an authority to show that where a statute contains a saving of the right to customary fees the Court will not inquire very narrowly into their antiquity.

[KELLY, C. B. Do you contend that a fee of 13s. has been payable since the time of Richard I?]

There is sufficient evidence to draw this inference; but it is enough if the fee is now reasonable, for what is reasonable in one age is not reasonable in another. In *Shepherd v. Payne*, 12 C. B. (N. S.) 414, 433; 31 L. J. C. P. 297, 304, where the claim was by the registrar of an archdeacon's Court to a visitation fee of 7s. 6d., WILLES, J., in delivering the judgment of the Court, says, with reference to the objection of rankness, that this reasoning is not applicable to the case before the Court, as a fee need not necessarily be of a fixed and ascertained, but may be of a reasonable amount.

[BRAMWELL, B. What is the test of reasonableness in the case of a gratuity?]

Long acquiescence is evidence of reasonableness. BLACKBURN, J., in his judgment in the Court below, states the rule to be that where there has been long-continued user of a right, a presumption arises that it is legal unless the contrary is *proved*. Here the enjoyment goes as far back as legal memory, and this is supported by the judgment in the case last cited, and by the case of *Jenkins v. Harvey*, 2 Cr. M. & R. 393; 5 L. J. (N. S.) Ex. 17. *Mills v. The Mayor, &c. of Colchester*, 36 L. J. C. P. 210, decided since the present case was argued in the Court below, is an authority to show that a custom for a reasonable payment, varying in nominal value from time to time, is good. Several authorities are there referred to in support of this proposition. Com. Dig. tit. "Toll." If the king grants a fair or market, he may also grant to the grantee to take a reasonable sum for toll. The case of *Heddy v. Wheelhouse*, Cro. Eliz. 558, does not bear out the proposition in support of which it is cited — Com. Dig. tit. "Market," (F. 1), "Toll," — that a toll about a penny or twopence is an unreasonable toll. The case



is better reported in R. Palm. 77, 86. In cases where the inhabitants of a district are bound to have their corn ground at a certain mill, or their bread baked at a certain bakehouse, the toll claimed has often been of uncertain amount. Rol. Abr. 559, tit. "Custom," (G 3.); *Drake v. Wigglesworth*, Willes, 654; *Fermor v. Brook*, Cro. Eliz. 203; *Corgton v. Letheby*, 2 Wms. Saund. 113 a, n. 1. In *Laybourn v. Crisp*, 4 M. & W. 320; 8 L. J. (N. S.) Ex. 118, a custom to have the exclusive right of unloading oysters in London, and to a reasonable fee for so doing, was upheld. It will be said that a custom for a marriage fee of varying amount is void for uncertainty, — *Id certum est quod certum reddi potest*. In *Palmer v. Moron*, 2 M. & S. 43, it is said that "a reasonable time is capable of being ascertained, and when ascertained is as fixed and certain as if fixed by Act of Parliament." In *Trotter v. Harris*, 2 You. & J. 285, it was held that a variation in the amount of ferriage would not avoid the franchise. *Gard v. Callard*, 6 M. & S. 69 (18 R. R. 310), declares that a reasonable toll may be [\* 219] \* recovered, and that long usage and acquiescence in one uniform payment is cogent evidence that it is reasonable. So also *Pollard v. Gerard*, 1 Ld. Raym. 703, reported more fully by the name of *Bullard v. Gerard*, 12 Mod. 608, shows that the officer of a Court may recover reasonable fees under a *quantum meruit*. *Stamford Corporation v. Pawlett*, 1 Cr. & J. 57, is an authority that there may be a grant of reasonable toll without the amount being specified. In the case of a *modus*, the essence of the composition is that it is fixed once for all.

[BRAMWELL, B. Is 13s. a reasonable fee at the present time?]

The length of time during which it has been paid is evidence that it is. He also cited *Jones v. Waters*, 1 Cr. M. & R. 713; 4 L. J. [N. S.] Ex. 109; Degge's Parson's Counsellor, p. 421; Watson's Clergyman's Law, 1033; Ayliffe's Parergon, 409; Starkie on Evidence, p. 911.

*Mellish* (*Macnamara* with him), for the plaintiff. The judgment of the Court below ought to be affirmed. There are two questions in the case, but they have been mixed together in the argument for the defendant. The judgment of BLACKBURN, J., assumes that it must be proved that this fee has been paid from time immemorial, and that affirmative evidence of the value of money would be evidence to show that the payment was not made in the time of Richard I. but it insists that the jury ought to be directed to disregard such evidence. On the other hand, the argument

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founded on the judgment of WILLES, J., in *Mills v. The Mayor of Colchester* is, that the fee may be supported under a custom to pay a reasonable sum of a varying amount. In the first place, with reference to the last argument, it must not be forgotten that this is not a claim for a *quantum meruit*, for the clergyman is bound by his office to celebrate marriages gratuitously, and any claim by him is in the nature of a gratuity, to be enforced by ecclesiastical censure when the amount had been fixed by custom. Not a single case can be pointed to in which a marriage fee has been claimed where the amount has not been fixed. The origin of monopolies, such as the obligation to grind corn at one mill, or have bread baked in a particular bakehouse, was the right of the owner of the mill, &c., who had built it and kept it in repair, to a reasonable sum in return, which, of course, would vary from time to time according to the nature of the consideration. A marriage fee is subject to different rules. Unless it were fixed in amount every beneficed clergyman could raise his fees, subject to an appeal to the ecclesiastical Court. If it could be raised in the time of Edward VI., why cannot it be raised at the present day? In *Spry v. Gallop*, 16 M. & W. 716, *per* POLLOCK, C. B., 730 (16 L. J. Ex. 218), the law is laid down with regard to the clergymen's fees in strict conformity with what has already been stated, also in the cases of *Andrews v. Cawthorne*, Willes, 536, and *Spry v. the Guardians of Margylbone*, 2 Curt. Eccl. Cas. p. 5, where a claim to burial fees to be paid out of poor-rates was rejected on the ground that they could not have been ancient. The constitution of Archbishop Langton (1222), given in Burn's Ecclesiastical Law, 9th ed., vol. ii. p. 480, is as follows: "We do firmly enjoin that no accustomed duty of the church shall be denied to any one upon the account of any sum of money, nor shall matrimony be hindered therefore, because if anything hath been ascertained (*consuetum fuerit*) to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards." And, in Lyndewoode's Provinciale, 279, in the commentary upon the words "*consuetum fuerit*" it is said, "Scilicet ab antiquo et per tempus præscriptibile, licet ex voluntaria præstatione. Nam ex quo tanto tempore solverunt, præsumuntur prius se ad id voluntarie obligasse." In Johnson's English Canons, vol. ii. 152, "Legatine Constitutions of Otto," are these words: "We ordain and charge that the sacra-

ments of the church in which, as in heavenly vessels, the means of salvation are contained, as also the consecrated oil and chrism, be purely and devoutly administered by the ministers of the church without any spice of covetousness under the pretence of [\*220] \* a custom, by which, say they, they who receive these sacraments make certain payments to certain persons." And in the same volume, p. 214, "Constitutions of Othobon," are directions to the same effect. With regard to the argument on the Rubric the words "accustomed duty" point to a fee which had then been fixed. In the cases of *Burdeau v. Lancaster*, and *Fuller v. Say*, already cited, the amount of the fee was fixed. None of the cases cited by WILLES, J., in *Mills v. The Mayor, &c. of Colchester* relate to marriage fees. The judgment of HOLT, C. J., in *Pollard v. Gerard* is indifferently reported and of little weight. Secondly, with regard to the arguments in the judgment of BLACKBURN, J., that positive proof must be given that the fee was not paid in the time of Richard I., the amount of the fee is as good evidence as if a parish register were produced. The cases of lost grants are the only instances where juries were directed to presume what they did not believe, and these cases led to replications of lost releases. The doctrine of rankness has not been restricted to cases of *modus*. In *Traherne v. Gardiner*, 5 El. & B. 940; 25 L. J. Q. B. 201, it was applied to a claim for steward's fees from copyhold tenants. In *Jenkins v. Harrey* the question did not arise, because port dues might have been created within legal memory. He also cited *Gunn v. the Free Fishers of Whitstable*, 11 H. L. Cas. 195; 35 L. J. C. P. 29, and the Statute of Labourers, 25 Edw. III. stat. 2, c. 1, 3, A.D. 1350.

*Coleridge*, in reply, cited *Campbell v. Wilson*, 3 East, 294, (7 R. R. 462), and *Thompson v. Davenport*, Lutw. 1059.

*Cur. adv. vult.*

The following judgments were delivered on the 9th of May, 1868. —

KELLY, C. B. This is an appeal from the judgment of the Court of Queen's Bench. The defendant, the rector of Horton, in the county of Buckingham, claims by prescription the sum of 10s., as payable to the rector, and 3s. to the clerk, upon every marriage celebrated in the parish; and the question is, whether this claim can be maintained. The evidence is, that from 1808 until 1854

these fees of 10s. and 3s. have been received and paid (with some slight variations, but which may be dismissed from the case as immaterial) upon all marriages solemnized in the parish; and the question is whether the Court, who have the powers of a jury in dealing with the facts, should hold up this evidence that the claim by prescription is sustained. The majority of the Judges of the Court of Queen's Bench have determined that it is not, and we are of opinion that this judgment should be affirmed. The true principle of the law applicable to this question is, that where a fee has been received for a great length of time, the right to which could have had a legal origin, it may, and ought to be assumed, that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary be proved. In this case the right to these fees may have had a legal origin before the time of memory, and the evidence that they have been taken in modern times, during a period of nearly fifty years, leads to the presumption that they were lawfully taken at the time of Richard I., unless the payment at that time be disproved. But we are of opinion that, considering the difference of the value of money in 1189 and the present time, of which the Court will take judicial notice, it is impossible that a payment of such an amount upon every marriage in this parish can have been made at that period; that the objection of rankness therefore applies, that the claim is negatived, and that the plaintiff, who seeks to recover back this fee which he has paid, is entitled to the judgment which he has obtained.

From the importance of the question, however, and the difficulties with which it is surrounded from the peculiar and anomalous state of the law, and from the high respect due to the judicial opinion delivered by my Brother BLACKBURN, who dissented from the judgment of the majority of the Court of Queen's Bench, it becomes necessary that we should carefully consider and observe upon the objections to the judgment adverted by Mr. Justice BLACKBURN, and \* which have been urged with great [\* 221] ability at the bar upon the argument before this Court.

It must be admitted, upon the part of the plaintiff, that the receipt of this fee for nearly fifty years is evidence that the payment is immemorial if it can have had a legal origin and the contrary be not proved. Here a legal origin may also be presumed. The payment of these fees was originally voluntary, but where



they have been paid before the time of legal memory, the title to them as a customary payment is established. But the payment must be immemorial, that is, they must have been paid in the time of Richard I.; and it is clear, upon all the authorities, that they can be deemed immemorial only if the payment at that period be not disproved. In *Jenkins v. Harcey* the language of PARKE, B., is this: "From uninterrupted modern usage a jury should find the immemorial existence of the payment, unless some evidence is given to the contrary." And the same case, when a second time before the Court, (2 Cr. M. & R. 393, 5 L. J. N. S. Ex. 21), is to the same effect. In *Shepherd v. Payne* upon appeal, 16 C. B. (N. S.) 132, 135, 33 L. J. C. P. 158, 160, BLACKBURN, J., in delivering the judgment of the Court of Exchequer Chamber, observes, "Where there has been long continued modern user of a right, capable of a legal origin, the existence of that legal origin should be presumed, unless the contrary be proved." This qualification "that the contrary be not proved," pervades the authorities, and we think necessarily applies to every case of a fixed money payment claimed as immemorial, and which must have existed before the time of memory; and looking to the difference in the value of money, we hold it to be impossible that such a sum as 13s. should have been payable as of right upon every marriage in a small rural parish in England in the time of Richard I.

But it is contended, on the part of the defendant, first, that this test of the value of money applies only to cases of *modus*. We find, however, no authority whatever for this proposition. In reason and on principle, it is impossible to distinguish between the payment of a fixed sum on a composition for tithes, and as a fee on the solemnization of a marriage, or on any other consideration or occasion of the like nature. And Lord CAMPBELL appears to have taken this for granted when he applied this test to the fee payable on admission to a copyhold, in the case of *Traherne v. Gardiner*. Here, then, the fact, not indeed expressly proved in evidence, but of which, as observed, the Court will take judicial notice, that the difference in the value of money is so great as to render it certain that this payment cannot have been made in the time of Richard I. is proof, and, as we think, proof conclusive, to rebut the presumption arising from the modern usage during fifty years, of an immemorial payment. *Jenkins v. Harcey* is cited as

an authority for the defendant upon this point, but the Court there held, and we think rightly held, upon the evidence in that case, that 4*l.* per chaldron for the metage of coal, and which included, or may have included, the use of a port, might well have been received in the time of Richard I., and was therefore not open to the objection of rankness. Besides, it was possible in that case that the port might have been granted with the metage of 4*l.* as a port-due within the time of legal memory, and so that the sum was recoverable although not immemorially taken.

*Shepherd v. Payne* is also relied upon by the defendant, but there the fee claimed by the registrar of the archdeacon for services performed upon a visitation was not a fixed sum, but a reasonable sum varying from time to time, though taken immemorially in respect of those services. And we must distinguish between a fixed fee and a reasonable fee. Either may be claimed by prescription, and if a reasonable fee be prescribed for, the amount may vary; indeed, to be reasonable, it should seem that it must vary; for that which is reasonable now can scarcely be said to have been reasonable in the twelfth century. Upon a careful consideration, therefore, of the whole of the authorities bearing upon this case, we are unable to find any one instance of the right to a fixed payment being sustained as immemorial where the amount was so large as to render it impossible or incredible that it should have been payable as of right in the reign of Richard I. The \* numerous decisions cited [\* 222] as authorities to the contrary will be found to be cases either of a lost grant or charter, or a conveyance which may have been made within time of memory, or of a claim, as in *Shepherd v. Payne*, of a reasonable sum varying in amount according to the value of money or other circumstances. If we assume, as insisted by Mr. Coleridge, that in all or the greater number of these cases, neither Judges nor juries have in reality believed that a grant, or a charter, or a conveyance had ever, in fact, been made (or in another class of presumptions, that customs found to be immemorial had actually existed in the time of Richard I.), still if this state of the law created by the Judges to quiet titles, to protect rights derived from long user or enjoyment, and so to supply the want of a just and enlightened legislation, be established by these decisions, we must accept it as we find it, and hold that long user or enjoyment, where a legal beginning is possible, shall be

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equivalent to a legal right, and that the belief or disbelief in the actual existence of the origin presumed is not an element in the question.

But the law thus explained and defined is perfectly consistent with the proposition contended for by the plaintiff here, that where to establish the right claimed, a state of things must actually have existed in the time of Richard I., which the Court or jury are satisfied cannot by any possibility have existed at that time, no length of user or enjoyment will support the claim. Where a lost grant, or charter, or conveyance is presumed in support of a claim to ancient lights, or any other easement, or to give effect to the possession or enjoyment of land for twenty years or more, or to the long receipt of a port-due, or of a fee or any other payment, and which instrument or payment may have been made or originated within the time of memory, it is at least possible that it may have actually existed, and the law, while it gives effect to claims resting merely upon long possession or user, is at least free from the absurdity of presuming an impossibility. But where, as in the case of a *modus* or marriage fee, the law is that the payment claimed must have begun before the time of legal memory, and the amount is so large that it cannot have been possibly made at so early a period, to presume that it was made would be to fly in the face of the law and to presume an impossibility.

We have thought it right to deliver our opinion upon the important question raised, and alone determined in the Court of Queen's Bench, but if it were necessary to consider the other points presented to us in the argument at the bar, we should be prepared to hold that a marriage fee must be a fixed fee, and cannot be of a varying amount, and that were it otherwise, the evidence in this particular case would not support the claim to a merely reasonable or varying fee; and further, we should pause before we could determine that the sum of 13s. is a reasonable fee to be demanded and enforced upon every marriage in a small country parish even at the present day. I believe I may state that the whole of the Judges who have heard the argument, with the exception of my Brother KEATING, concur in the judgment which I have now delivered. My Brother BRAMWELL, and, I believe, my Brother BYLES, may not adopt the reasons which are here assigned for the opinion delivered, and I believe my Brother

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BRAMWELL desires to state his own opinion and that of my Brother BYLES.

BRAMWELL, B. Not dissenting from anything that my LORD CHIEF BARON has said, I desire to deliver my own opinion in this matter. My Brother BYLES has desired me to say that he agrees with my conclusion, and substantially for the same reasons that I am about to give. In this case the question is, whether 13s. is a legal fee or accustomed duty payable on the celebration of a marriage in the parish of Horton; and if not, whether there is any and what fee! The latter part of the question may be disregarded, it not being suggested that any fee can be demanded as of right if the fee of 13s. cannot. We are to perform the duties of Judge and jury. In the former capacity it is agreed that we are to say that no fee is due as of common right, but that it may be due if immemorially paid, namely, from the time of Richard I., and if a reasonable fee. This is the law we are to pronounce, and to entitle the defendant to a verdict, these are the facts we are to find. That being so, I say, unhesitatingly, that I \* cannot find this is a reasonable fee now. It is a week's [\* 223] wages of an agricultural labourer; and it is not right that such a sum should be demanded as of right from such a person for a duty which properly should be performed gratuitously. If this is a reasonable amount, it is unreasonably low for the adjoining parishes. Further, I do not believe it has been demanded *as of right*, and paid at any time. It may have been asked for and insisted upon in certain cases, but I feel convinced that in many it has not. Evidence was given of thirty marriages from 1808 to 1854, but it is not said there were no other marriages in that period. The conclusion I draw is, that the case is the common case of persons holding an office assumed by those who deal with them to know the rights of the office, always ready to encroach, turn a gratuity into a duty, and whenever the customary gratuity was raised in any particular instance by the liberality or piety of the party, ready to treat that as the due in the next case, and obtain it by mixture of request, demand, and appeal to the then payer that he would not be less liberal than the last. It must not be supposed I apply this remark to the defendant, or any in particular of his predecessors. I have no doubt the fee has not been pressed whenever it could not well be paid, and that it is only demanded as of right now to determine a right.



Besides, the person who receives the fee is, I believe, the clerk, who probably would have no knowledge whether anything was due in point of law or not, but would have a strong interest in claiming that there was. But supposing I get over this difficulty, and that the fee was of such an amount that it might well be paid now, the question would still remain whether I could find as a jurymen, that it was due as of right in the reign of Richard I. Now, I am perfectly satisfied it was not. I adopt my Brother MELLOR's language: "Common sense revolts at the idea. I cannot merely say that I am not satisfied it existed, but I am compelled to say that it did not and could not have existed." Nobody believes it did, nor in the reign of Edward III., when we bear in mind the prices of articles mentioned in the statutes of that reign. The question, then, is, whether, under these circumstances, we are called upon to do violence to our consciences by finding that this custom dated back to the time of legal memory, when we are convinced that such cannot be the case? Why am I to find the contrary of what I am satisfied is the truth? I would, if the law ordered me, leaving the responsibility to the law. If an Act of Parliament said that in certain cases a jury should find black to be white, though one would regret such trifling with an oath and the administration of justice, the jury ought so to find. But that is not the law,—I am not told I am bound, but advised so to find. Then I regret the advice. It seems to me no technical question of rankness properly arises here. I believe this fee was not paid *two* centuries ago. I am satisfied it was not four centuries back, from the value of money at that time. How can I shut my eyes to this consideration, or, if I receive it, decline to be influenced by it? The doctrine of rankness is not a rule of law, it is a question of evidence. It arises as much with respect to one question as to another, as to one date as to another. If a defendant covenanted to pay all fees lawfully payable in the reign of Edward III., rankness, or a question analogous, might well arise. I wish to add, I consider this decision quite consistent with the case of *Shepherd v. Payne*. I think, therefore, the judgment should be affirmed. It is said this will cause a deal of mischief, and deprive persons of property supposed to be perfectly safe. It is obvious that it will only affect usurped claims. If that is objectionable, the Legislature must set it right. I say, with my LORD CHIEF JUSTICE, "Such is

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the law, and while it so continues I consider myself, in administering it, as bound to administer it as I find it; nor do I feel myself warranted in undermining or frittering it away by subtle fictions or artificial presumptions, inconsistent with truth and fact."

KEATING, J. The defendant in this case is rector of the parish of Horton, in the county of Buckingham, and claimed to be entitled to a fee of 10s. as payable to the rector and 3s. to the clerk for every marriage by banns (with certificate of the same) celebrated in that parish; and the question \* is, whether [\* 224] such claim can be maintained. The evidence, as stated in the special case, showed that as far back as living memory went the fee claimed, with certain immaterial variances, had been paid; distinct evidence was given of its receipt from the year 1808; and there was nothing to show that it was not then an ancient fee. There does not seem to be any doubt that a legal origin could be assigned to its payment, and therefore the proof given in this case is that upon which juries, in such cases, have always been directed that they ought, in favour of long-continued user, to presume it to be immemorial, unless the contrary were proved. In the present case no direct proof in contradiction was given, but it was said the Court, as a jury, ought not to make the usual presumption, because, considering the change in the value of money that has taken place since the reign of Richard I., no such payment as that claimed could have been made at that period, and must, therefore, have originated within the time of legal memory; in other words, that the Court was bound to apply to this case the doctrine of rankness, as it is called, which has been applied in cases when the defence of a *modus decimandi* has been set up in answer to a claim for tithes. Accordingly, a majority of the Judges of the Court of Queen's Bench considered themselves bound by that analogy, and decided that, in consequence of the change in the value of money since the reign of Richard I., the fee claimed in this case could not have been paid at that time; that it was therefore bad for rankness, and upon that ground alone gave judgment for the plaintiff; my Brother BLACKBURN, however, holding that the doctrine of rankness was not applicable to such a case, and giving his judgment for the defendant. At present, the question is, whether the judgment of the majority of the Court of Queen's Bench was right. The decision is undoubtedly one the importance of which can scarcely be exaggerated, for it is not easy

to see how any fees supposed to be payable in respect of marriages, burials, or baptisms, can, for the future, be sustained, if submitted to the same test, even though their existence may have been recognized and their distribution provided for by several Acts of Parliament; nor will its effect be confined to ecclesiastical fees, for a rigid application of the doctrine seems to place in peril many, if not the greater number, of ancient fixed payments supposed, until lately, to repose securely upon long-continued user. That this is not an ill-founded apprehension seems clear from the case of *Laurence v. Hitch*, L. R., 3 Q. B. 521, 37 L. J. Q. B. 209, in which the Court of Queen's Bench, applying the same doctrine of rankness, held that a toll of 1s. claimed as immemorial by a lord of the manor for every cart with vegetables, &c., for sale coming within the streets of a market town, could not be sustained (although received as long as living memory went back), upon the single ground that it was rank, and could not, therefore, have been paid in the reign of Richard I.; and my Brother BLACKBURN felt bound, by the authority of *Bryant v. Foot*, 36 L. J. Q. B. 65, to concur in the judgment.

It is necessary, therefore, to see what it is that is meant by this doctrine of rankness, as applied to an ancient payment. It cannot be intended that in order to make the fee of 13s. good in the present case, the same amount of coins called shillings must have been paid in the reign of Richard I., for although the shilling was known in England at that time as a measure of value or, as it is called, "a money of account," yet, as a coin it did not exist, its first appearance as a coin being in the reign of Henry VII. (1504), nor, I apprehend can it have been decided that in order to make an ancient payment good, it must have remained unchanged, both as to its nominal and real amount, since the time of Richard I., inasmuch as that would be simply impossible. The pound weight of silver, which Henry VII. coined into twenty shillings, is now coined into sixty-six shillings, and the copper coinage of England is said to date from the reign of Charles II. The copper penny of our day as little represents the silver penny of Richard I., as the shilling of his time would measure the value of the shilling of the present day. When it is said, therefore, that to make this payment of 13s. good the same amount must have been paid in the twelfth century, it is difficult to see how that [\*225] requirement \* could be satisfied by showing a payment of another and different amount, as 13s. of that period would

certainly be, unless seven or eight ounces of silver can be said to be the same as two or three ounces, or that the one remains "fixed and certain" by the payment of the other. It would seem, therefore, if we are to resort to antiquarian research in order to test the possibility of the existence of a payment in remote ages, the real, and not the nominal, value would be the more reasonable criterion, the more especially as in times as early as those of Richard I., payments seem to have been made in kind, the little and rude money that existed being locked up in the coffers of the barons; but, in truth, an inquiry into the exact value of money at the period referred to would be useless, as even the research of Mr. Hallam could not carry it back further than the reign of Henry III. (Middle Ages, vol. 3, p. 368, 11th ed.). That its scarcity, and consequently its relative value, was very much greater than at present, there can, however, be no doubt, although the way in which it was distributed is full of uncertainty. So also the difficulty is great to ascertain the natural prices either of commodities or labour in an age when they were regulated, or rather attempted to be regulated, by authority; but it is clear that, at a time when the powers of the church and the army predominated, any services performed by either would be likely to be largely remunerated. Thus, according to Hume (History of England, c. xvi. s. 14); as late as the reign of Edward III., when the Statute of Labourers fixed the wages of a master carpenter at 3*d*. a day, the wages of a private soldier were 6*d*., and the pay of a man-at-arms 2*s*. If, therefore, we are to be driven to speculate upon what might have been the amount of the marriage fees paid to the clergy in those ancient times, we may safely presume them to have been very large. In the reign of Richard I. marriages were celebrated, not in church, but at the house of the bridegroom — see Cripps's Law of the Church and Clergy, p. 667 — the bull of Innocent the Third, first ordaining the celebration of marriages in churches, being in 1199, the year of Richard's death; consequently, the services performed by the priest would not be confined merely to reading the marriage ceremony, but would involve travelling expenses, and the labour of writing out the certificate — probably upon vellum — services which, when performed in those days, and by the clergy, would be sure to command a high rate of remuneration, no doubt rendered in kind. Why, therefore, are we to assume it to be impossible that a fee



corresponding in amount with that now claimed could have been paid in the reign of Richard I. ? and why are we to assume it for the purpose of defeating established usage ? Of course, it cannot be affirmed as a fact that any such payment really was made ; but surely the difficulty and uncertainty of the subject shows the wisdom of the long line of Judges who have preceded us in their refusal to enter upon any such inquiry. I say " their refusal to enter upon it ; " for I am not aware of any case before the present in which a claim to an ancient payment shown to have been made as far back as living memory extends has been defeated upon the single ground of what is called its rankness, although probably in every case in which an immemorial payment has been sustained, such an objection, if valid, would have been fatal. The suggestion that in such cases the immemorial payment has been found by the jury evades but does not get rid of the difficulty, as, if the question did not arise before the Court in *Banco* it must have been mooted at *Visi Prius*. But juries have always been directed that they ought to make every presumption in support of established user. Indeed, in the well-known case of *Jenkins v. Hurcey*, the Court of Exchequer granted a new trial, because the Judge had told the jury that they might, from long-continued payment of a port-due, presume it to have been immemorial, instead of instructing them that they ought so to presume. The presumption of a lost grant was another, perhaps the strongest, illustration of the length to which Judges and Courts have gone in support of established user, " not," as was said by Lord MANSFIELD, in *Eldridge v. Knott*, 1 Cowp. 214, " that in such cases the Court really think that a grant has been made, because it is not probable a grant should have existed without its being on [\* 226] record, but \* they presume the fact for the purpose, and from a principle of quieting the possession ; " and see this principle discussed at length and fully confirmed by the Irish Exchequer Chamber in the recent case of *Deeble v. Linchan*, 12 Ir. Law Rep. 1, where the Judge having told the jury, in answer to a question by them, that they must find, as a matter of fact, that a deed had been actually executed, the Court of Exchequer Chamber held it to be a misdirection. Indeed, the progress of judicial decisions upon this subject cannot be more forcibly described than in the judgment of the LORD CHIEF JUSTICE in the present case, who designated it as " judicial legislation," and such

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it must be admitted to be, but I apprehend wise and beneficial legislation, rendered absolutely necessary by the previous "judicial legislation" which established the reign of Richard I. as the extent of legal memory. The Legislature, says the LORD CHIEF JUSTICE, in giving judgment in this case, having thus adopted the reign of Richard I. as the date from which the limitation in a real action was to run, the Courts of law adopted it as the period to which, in all matters of prescription or custom, legal memory which, till then, had been confined to the time to which living memory could go back, should thenceforth be required to extend. The presumption, therefore, to be made from usage as far as living memory goes back, and the necessity for such presumption, both stand precisely on the same "judicial legislation," and to insist upon the one and reject the other is, as it seems to me, to accept the bane and refuse the antidote.

The doctrine of rankness as applied to cases of *modus* was of comparatively recent origin, clearly exceptional and not always acquiesced in. Its origin is stated in the case of *Sansom v. Shaw*, 2 Eag. & Y. Tithe Cases, 120, and cited by Mr. Harington in his argument in the case of *Lawrence v. Hitch*, when Serjeant Belfield *arguendo*, said, "as to rankness, he was so old as to remember almost its beginning; WARD, C. B., first introduced it; he was a great patron of the clergy and carried their rights a great way." The Court in the same case treated the doctrine with scant courtesy. WILLES, C. J., in giving judgment said, "The first of these objections is that the *modus* is rank, and therefore cannot be so old as the time of Richard I., the time of prescription, for that 10*l.* then would be 20*s.* now. It is said, and I am afraid truly, that there have been many cases determined upon this footing. The fewer the better; but I am afraid they are not in point, for then they might have misled more than they have already. . . . It is a strange notion, and most so in the present case. What is it founded upon? That it is not likely that the owners of the land would agree to pay more than the value of the land. But we cannot go upon presumptions, but proof. And what proof is there of the value of land in this country in the time of Richard I.?" He then expresses an opinion that, according to Littleton, s. 170, the time of Richard I. was not the time of prescription, adding, "If the time of Richard I. was time immemorial in the time of Henry VI., the time of Henry VI. is immemorial now."

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FURNETT, J., in his judgment in the same case, after stating his opinion upon the subject of prescription, proceeds, " My Brother BELFIELD has given us the history of the beginning of the doctrine of rank *modus* in Lord Chief Baron WARD's time, and I have had another case given me by a learned Judge, which shows the end of it, the case of *Gifford v. Webb*, 2 Eag. & Y. 28, in the Court of Exchequer. That was a bill for tithes in kind by the rector of Stoke, and the defendant set up a *modus* of 3*d.* for every lamb fallen. It was insisted that this would be equal to 30*d.* now for every lamb, and was therefore bad. Yet it was decreed in favour of the *modus*, and the decree was confirmed in the House of Lords on appeal there, in 1735, 7 Bro. P. C. 15; and there was an end of rank *moduses*. I believe they have never been heard of since." It is needless to say that the anticipations of the learned Judge have not been realized. The doctrine continued to be applied to some cases of *modus*, but never extended beyond them until the present case. Not to go through the various cases in [\* 227] which ancient payments \* have been sustained as immemorial, although the objection of rankness, if valid, would have been fatal, and many of which have been adverted to by BLACKBURN, J., in his judgment in the Court of Queen's Bench, we may come at once to the recent case of *Shepherd v. Pague*, where the Court of Common Pleas upheld a claim for immemorial fees of 7*s.* 6*d.* and 4*s.* 6*d.* payable to the registrar of the Archdeaconry Court of Colchester, upon the ground that a reasonable fee may be claimed by prescription, and that those claimed upon the facts stated in the special case were reasonable. In that case it was argued that the fees were rank, and that they were so according to the test in the present case there could be no doubt; but that objection was met by the Court holding that the fee " need not be of a fixed and ascertained, but may be of a reasonable amount." Even if such an objection could be applicable to such a claim, the reasoning in *Shepherd v. Pague* appears to me to be equally applicable to the present case. It was said it could only be so when the fee is payable for work and labour done; but here the fee in its origin was probably for work and labour done, and at the present time appears to be so, including, as it does, not only the services of the clergyman and clerk, but also the writing out of the certificate of marriage. The case of *Shepherd v. Pague*, 16 C. B. (N. S.) 132, 33 L. J. C. P. 158, was carried to the Ex-

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chequer Chamber, and that Court affirmed the decision of the Court of Common Pleas, not upon the grounds taken in that Court as to which the majority gave no opinion, but upon the ground that the facts stated in the case were such that "it should be presumed the fees of 7s. 6d. and 4s. 6d. were immemorial fees attached to the office of registrar, if that prescription were necessary to give them validity." Now that those fees were rank, according to *Bryant v. Foot*, I should have thought nobody could seriously doubt. To suppose that the registrar of the Archdeacon of Colchester really received those identical fees in the reign of Richard I. is at least as difficult to believe as that the fees now claimed were then paid to the rector of Horton; yet the Court decided, notwithstanding such rankness, that the ordinary presumption from long user ought to be made. That decision, therefore, appears to me to be a distinct authority against the decision of the majority of the Court of Queen's Bench in the present case. It was said in the Court of Queen's Bench in the present case, that the point of rankness was not taken by the learned counsel who argued the case of *Shepherd v. Payne* for the appellant in the Court of Exchequer Chamber. The fact that Mr. Mellish did not take the point, considering he was on the losing side, and wanted a good point, is in itself not without significance; but it certainly was taken in the Court of Common Pleas, and although it was not formally taken in the Exchequer Chamber, yet that it was present to the minds of that Court in giving judgment seems clear from the terms of the judgment itself. "The true rule," says BLACKBURN, J., in delivering the judgment of the Court, "seems to be laid down by Lord WENSLEYDALE, in *Jenkins v. Harvey*, 1 Cr. M. & R. 877, 5 L. J. (N. S.) Ex. 17, where he says that the correct mode to direct a jury is to tell them that from uninterrupted modern usage they should find the immemorial existence of the payment (if that be necessary for its validity) unless some evidence is given to the contrary, or, as he says in delivering the written judgment of the Court on the second trial of the case (2 Cr. M. & R. 407, 5 L. J. N. S. Ex. 17), from proof that an office existed in 1752 the jury may, and ought to, presume it to be prescriptive, if that be necessary to make it valid, unless the contrary be proved." (The claim in that case was by the corporation of Truro for a metage due of 4d. per chaldron for coals in that port, and it was supported. I may mention this as showing what is meant by the



latter part of the sentence quoted. I suppose neither the Barons of the Exchequer nor the jurors as antiquarians, believed that 4*d.* per chaldron was actually paid before Richard I. returned from the Holy Land, but the modern user was enough to cast upon the other side the onus of proving that it was a usurpation.) [\* 228] "We think, therefore, that if it be necessary for \*the validity of these fees that fees of that amount should be immemorial, that presumption ought to be made." This was the judgment of POLLOCK, C. B., BRAMWELL, B., CHANNELL, B., BLACKBURN, J., and MELLOR, J., agreeing with the Court of Common Pleas both in their judgment and the reasons upon which it was founded; in support of which see also the authorities collected in the judgment in the case of *Mills v. The Mayor of Colchester*. Upon these grounds, therefore, and agreeing as I do with the judgment of my Brother BLACKBURN in the Court below, I am of opinion that the claim of the defendant to the fees in question cannot be defeated upon the ground of rankness as applied by the majority of the Court of Queen's Bench.

There remains the question of fact: Are the fees reasonable? and, looking at the statements in the special case, I cannot say they are otherwise than reasonable. It appears that the fees claimed including the certificate, have been paid as far as living memory extends, without demur, and they would probably have so continued had not the clergyman insisted upon that which he had no right to insist upon, viz., prepayment. It appears also, that although the fees claimed are considerably higher than in the majority of the neighbouring parishes, yet that the fees in some are the same, and in one or two somewhat larger than those here claimed. Nor do I think the charge to the labourer of the fee claimed less reasonable or more opposed to public policy than the demand of 5*s.* by the lay registrars. The Marriage Acts themselves recognize a difference in the remuneration for similar work to the clergyman and the registrar, and the labourer can, if he pleases, be married at the statutable price. Upon the whole, I am of opinion that the judgment of the Court of Queen's Bench ought to be reversed.

*Judgment affirmed.*

#### ENGLISH NOTES.

In *Mills v. Mayor, &c. of Colchester* (1867), L. R., 2 C. P. 476, 36 L. J. C. P. 210, 16 L. T. 626, 15 W. R. 955, certain *dicta* of the

Nos. 1, 2. — *Mounsey v. Ismay*; *Bryant v. Foot*. — Notes.

Judges in the Queen's Bench in *Bryant v. Foot*, which appear to throw doubt on the point that a reasonable fee (and therefore one of varying amount according to circumstances) could be established by custom, were disapproved. The facts in the case, as set forth in a special case, were that a certain corporation, the owners of an oyster fishery, had, since the reign of Elizabeth, held courts, and granted, for a reasonable fee, licenses to fish, to all persons inhabiting certain parishes who had been apprenticed for seven years to a duly licensed fisherman. The action was brought by a person so qualified against the owners of the fishery for not granting him a license to fish, on payment of the usual fee. It was held that, as it was by the facts stated admitted that a license was necessary, and every act of fishing was by the leave and license of the Corporation, the enjoyment was not of right so as to found a claim by prescription. In the judgment of the Court (WILLES, J., KEATING, J., and MONTAGUE SMITH, J.), the question was considered whether a custom, involving the payment of a reasonable (and so far varying) fee could be good; and they held upon the authorities (Com. Dig. Toll. (e.), *Drake v. Wigglesworth*, Willes, 654, *Gard v. Callard*, 6 M. & S. 69, 18 R. R. 310, *Shepherd v. Payne*, 12 C. B. (N. S.) 433, 31 L. J. C. P. 297), that it was no objection to the custom, if otherwise good, that the fee paid for licenses was not fixed, but a fee of reasonable amount.

In *Lawrence v. Hitch* (Ex. Ch. 1868), L. R., 3 Q. B. 521, 37 L. J. Q. B. 209, 18 L. T. 483, 16 W. R. 813, 9 B. & S. 467, a somewhat similar claim to that of the principal case was decided with an opposite result. By a grant of Henry III. (in 1220) the manor of Cheltenham with a market and fair was granted by Henry III. to the inhabitants at a certain rent, and for a term of four years. By a grant of Charles I. the manor of Cheltenham with all rents, etc., and tolls of markets, etc., was granted to H. and others (the predecessors in title of the plaintiff), their heirs and assigns. The question related to a toll of 1s. for a cartload of vegetables and fruit brought into the market. The toll at that rate was proved to have been collected as of right since 1810. It was held that it ought to be presumed that the toll of 1s. had been taken by the lord of the manor entitled to it from time immemorial; and that, if the doctrine of rankness applied, the other facts (including the finding that 2s. 6d. had been paid for stalls in the market from time immemorial) went to show that a toll of 1s. for a cartload of vegetables was not unreasonable in the time of Richard I. It was further held that the claim might be sustained as a claim to a reasonable toll, which might vary in amount with the value of money. And further that a lawful origin of the toll might be presumed within legal memory by means of a dedication of the streets to the public and a contemporaneous reservation of this toll on the part of the Crown between the time of

Henry III. and Charles I. when the manor appears to have been vested in the Crown.

In *Simpson v. Wells* (1872), L. R., 7 Q. B. 214, 41 L. J. M. C. 105, 26 L. T. 163, it was held that there cannot be a legal custom to put up stalls for refreshments at statute sessions for the hiring of servants. For, as the statute sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III., there could be no such custom by immemorial usage.

### AMERICAN NOTES.

It is well settled in this country that it is essential to the validity of a custom that it should be established and known, but the doctrine that it must be "ancient," as laid down in the principal cases, is not recognized here, for the decisive reason that this country was not discovered until several centuries after Richard I. In this new land we cannot revert, for customary purposes, much, if any, further back than "Poor Richard," the name under which Benjamin Franklin published his celebrated Almanacs. Mr. Lawson discards antiquity, in the English sense, as a requisite of a custom. (*Usages and Customs*, p. 27.)

In *Stevens v. Paterson, &c. R. Co.*, 34 New Jersey Law, 532, it was held that by local custom a shore owner may reclaim land between high and low water marks. In *Allen v. Stevens*, 5 Dutcher (New Jersey), 513, the Chief Justice said: "It would be impossible to carry back a right to the period at which legal memory begins. This State was then uninhabited." Citing *Ackerman v. Shelp*, 3 Halsted (New Jersey), 125, in which it is said that "civil rights could not consequently have been in use till more than three hundred years after the beginning of the reign of Richard the First."

It was held in 1809, in *Rust v. Low*, 6 Massachusetts, 90, that this country had been settled long enough to allow a prescriptive right of fencing.

In Virginia it is held that a custom opposed to the common law, however general, is invalid because it necessarily lacks the requisite antiquity, and so the Court discarded the custom that the outgoing tenant should have the away-going crop, as settled in *Wigglesworth v. Dallison*. *Harris v. Carson*, 7 Leigh, 632. The same principle was reiterated in *Delaplaine v. Crenshaw*, 15 Grattan, 457.

In a very late Connecticut case, *Smith v. Phipps*, 32 Atlantic Reporter, 367, the Court observed: "At the common law, a custom was not an established one unless it was shown to have existed from time immemorial. By the more recent law, the true test of such a custom is its having existed a sufficient length of time to have become generally known, and to warrant the jury in finding that the contracts were made in reference to it." *Powell v. Bradlee*, 9 Gill & Johnson (Maryland), 220; *Burroughs v. Langley*, 10 Maryland, 248; *Smith v. Wright*, 1 Caines (New York), 43; *Treadwell v. Insurance Co.*, 6 Cowen (New York), 273; *Crosby v. Fitch*, 12 Connecticut, 410; *Blicen v. Sever Co.*, 23 Howard (U. S. Sup. Ct.), 431. No person can be made liable by reason of a custom, except when it is shown that he had knowledge of

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the custom. In cases where the custom is a limited or special one, actual knowledge must be proved; and every custom is a limited or special one until it is shown to have existed long enough to sustain the test above stated."

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**No. 3. — FITCH v. RAWLING.**

(C. P. 1795.)

**No. 4. — WILSON v. WILLES.**

(K. B. 1806.)

**No. 5. — TYSON v. SMITH.**

(EX. CH. 1838.)

**RULE.**

A CUSTOM to be good must be limited, certain, and reasonable, and must have had a lawful origin.

**Fitch v. Rawling.**

2 H. Bl. 393-399 (s. c. 3 R. R. 425).

*Custom. — Reasonable. — Inhabitants. — Village Green.*

A custom for "*all the inhabitants* of a parish to play at all kinds of [393] lawful games, sports, and pastimes in the close of A. at all seasonable times of the year, at their free will and pleasure," is good. But a similar custom, "*for all persons* for the time being, *being in the said parish*," is bad.

This was an action of trespass for breaking and entering the plaintiff's close at Steeple Bumstead in Essex, and playing there, with divers other persons to the plaintiff unknown, at a certain game called cricket, and other games, sports, and pastimes, and in so doing, &c.

Pleas. 1st. Not guilty by all the defendants. 2d. By Chatteris, "That there now is and from time whereof, &c., hath been a certain antient and laudable custom used and approved of in \* the said parish, that is to say, that all the inhabitants for [\* 394] the time being of the parish aforesaid, have during all the time aforesaid, used and been accustomed to have, and of right ought to have had, and still of right ought to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports, and



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pastimes, in and upon the said close in which, &c., every year, at all seasonable times of the year, at their free will and pleasure ;” he then averred that at the several times when, &c., he was an inhabitant of the said parish, and at those times, being seasonable times, he entered the *locus in quo*, and played at cricket, &c. The third plea by Rawling and Fitch, stated the custom to be for “all persons for the time being, being in the said parish, to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports, and pastimes, in and upon the *locus in quo* at all seasonable times, &c.” and justified under that custom.

The replication to each plea traversed the customs alleged, and on the traverses issues were joined, and a verdict found for the defendants. And now Le Blanc, Serjt., showed cause against a rule to arrest judgment.<sup>1</sup> There is no good objection to the customs stated on this record, and therefore no ground for arresting the judgment. It is laid down in *Gateward's case*, 6 Co. Rep. 59 b., that though a custom for the inhabitants of a place, as such, to take an interest or profit in the soil of another is bad, yet a custom for them to have an easement in another's soil is good. In *Abbot v. Weekly*, 1 Lev. 176, a custom for the inhabitants of the vill to dance in the plaintiff's close for their recreation, was holden to be a good one. Here the case is stronger than that of *Abbot v. Weekly*, the custom being alleged to be, to play at lawful games and sports at all seasonable times. As to the custom in the second plea, there is no material difference between the inhabitants and persons being in the parish. The claim of both is merely for an easement, and there seems to be no more ground to object to all persons being in the parish enjoying the easement, than to all the king's subjects passing over a highway, in the soil of another.

[\* 395] Bond and Heywood, Serjts., in favour of the rule.

Neither of the customs stated on this record can be supported. With respect to the first, a custom for all the inhabitants of a parish to have the liberty of exercising and playing at all kinds of lawful games at seasonable times of the year, at their free will and pleasure, is bad. There is great uncertainty in the

<sup>1</sup> When the rule was moved for, Mr. Justice BULLER observed that as there was a verdict for the defendants on the whole record, it was useless to move in arrest of judgment, for as it appeared that they had not committed the tres-

passes complained of, it was immaterial what became of the special issues. The *postea* therefore was amended by entering a verdict for the plaintiff on the general issue, and for the defendants on the others.

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description of inhabitants ; it includes all servants, visitors, women, and children ; it depends neither on time nor estate ; their interest is transitory, and not in general noticed by the law. There is a jealousy therefore entertained by the law, of the inhabitants of particular districts claiming rights in the soil of others. They cannot claim by prescription, but only by custom. But when they claim by custom that for which others prescribe, which is allowed from the necessity of the thing, the legality of the custom is to be examined by the same rules as if it were a prescription. Hob. 86, *Day v. Savage* ; 1 Ventr. 383, *Potter v. North*. Now it is clear that nothing can be prescribed for, which is not the subject of a grant, a prescription supposing an original grant. But a grant to all the inhabitants of a place would be bad for its uncertainty. They cannot claim a profit *à prendre* in the soil of another, but are restrained to matters of discharge in their own, as from toll, 3 Mod. 290, *Pain v. Patrick*, from tithes, Cro. Jac. 152, or to matters of easement in that of another. The matters of easement which they may claim are to be classed under two heads, — such as are necessary for the enjoyment of their own estates, and such as are for the public good. Instances of the first kind are customs to water cattle at a certain watering-place, to turn a plough in another's land, 3 Mod. 293 ; to use a way to a church or market, Cro. Jac. 152, Cro. Car. 419, or to a well or spring, 15 Ed. IV. 29, and the like. Of the second kind are customs to perambulate a parish, Cro. Eliz. 441 ; to erect a stall in a market, 3 Mod. 292 ; for fishermen to dry their nets, Cro. Car. 419, and the like. The custom stated in the second plea, if it can be supported, falls within the latter class. But in order to make it good, it ought to have shown that the games were for the recreation and health of the inhabitants, and that Chatteris played for his recreation, on which ground the custom in *Abbot v. Weekly* was holden to be good ; it is not sufficient that they were merely for pleasure. This plea is also bad, as not being an answer to the trespass laid in the declaration, which is "that the defendants broke and entered and remained in the plaintiff's close, and there played together with divers other [\* 396] persons to the plaintiff unknown, at a certain game called cricket." The defendant, Chatteris, justifies this by saying, that the inhabitants by custom have a right to play there, and therefore, he as one of them played there. It appears therefore on the record, that he played with the other defendants who were not inhabi-

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tants, and with other persons. To them this justification cannot be applied: they were trespassers, but what they did together was one act, 2 Roll. Rep. 224, *Storey v. Rice*, and if they were trespassers, he was one too, for he aided and assisted them. If he be supposed to have been there by licence of law, he became a trespasser *ab initio*, by abusing that licence.

With respect to the third plea, the custom there stated is also bad, it being for all persons being in the parish, that is, for all persons in the world, who may choose to come into the parish. This is void for its generality. If there be such a right, it is by the common law, and not by custom. Co. Litt. 110 b. So a right for all the men of Kent to make trenches and bulwarks on the coast against an enemy, is by the common law, and not by custom. Bro. Abr. tit. Customs, pl. 45. So for all the fishermen of Kent to go on the land of another to fish. Ib. 46. So for all executors to be sued by action of debt in the mayor's court of London. Fitzgibb. 51. If there be such a right for all persons, any one might bring an action for an obstruction of it. Co. Litt. 56 a, *Westbury v. Powell*. But surely it will not be contended that such an action could be maintained, independent of property or inhabitancy. The right claimed resembles a right for all the King's subjects to pass and repass over a public highway, but no action could be maintained for obstructing the highway, without special damage.

But be these customs good or bad, the plaintiff is entitled to judgment, or at least there must be a *venire de novo*. On the same record the jury have found that two contradictory customs exist in the same place. Admitting that defendants may sever in their pleas, and plead inconsistent matters, the jury cannot find such inconsistent matters, because they cannot exist in fact. The larger custom in this case cannot prove the smaller, because the larger is void in law, and because the persons are different who are [\* 397] to enjoy the benefit claimed. Thus a custom for a copyholder to have common as belonging to his customary tenement, is not supported by evidence of a custom extending to all the tenants. *Brook v. Smith*, MSS. of PERROT, Baron.<sup>1</sup> So a prescription for a general right of common for 100 sheep, is not proved by

<sup>1</sup> This case is mentioned in the MSS. of Assize, 1726, who ruled the point, Mr. Baron Perrott, as having been tried at which was acquiesced in by the Bar. *Nisi Prius*, before CARTER, Serjt., Judge

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showing such right for 120 sheep, Cro. Eliz. 722, though a prescription for a general right of common will prove a prescription for any particular sort of common, Bull. N. P. 59, and though a prescription for 100 sheep is supported by evidence for 100 sheep and 6 cows. Cro. Eliz. 722.

Le Blanc, Serjt., who was going to reply, was prevented by the Court.

BULLER, J.<sup>1</sup> Some nice and critical objections have been made to the pleadings in this case, which I shall first consider. It is said that the plea of the defendant Chatteris does not answer the complaint laid in the declaration, which is, that all the defendants, together with divers other persons unknown to the plaintiff, played at cricket in the plaintiff's close, but that the plea alleges the custom to be for the inhabitants of the parish to play at cricket there, and that Chatteris as an inhabitant so played, that is, says my Brother Heywood, that he played there with other persons who were not inhabitants, and who were therefore trespassers, and that he himself by aiding them in their trespass, was guilty of an abuse of a licence in law, and therefore a trespasser *ab initio*. But this objection, supposing it to be a good one, does not arise on the face of the plea, and if the plaintiff would have availed himself of it, he ought to have set it out by way of replication. It cannot prevail on a motion in arrest of judgment, for admitting it to have more weight than I think it has, after verdict, it is cured by the Statutes of Jeofails.

Another objection made is, that the customs, whether good or bad, are repugnant to each other, and therefore that the Court cannot give judgment on either of the special pleas, though found for the defendants. But it would be very strange if one defendant should plead a good plea, and it were found for him, that he should not have judgment, according to the justice and truth of the case, though the other defendant should plead a bad plea. But why are these customs inconsistent with each other? It [\*398] might happen that there might be at first a limited custom, and afterwards a more extensive one, and I do not see why the second should root up the first, or why they might not both exist together, supposing the second to be a good one.

But the real question is, whether the customs as stated are good. It is objected to the first custom, that it is not alleged to

<sup>1</sup> Absent the LORD CHIEF JUSTICE.



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be for the necessary recreation of the inhabitants, nor that the defendant Chatteris went into the close in question for his recreation. But in the case in *Levinz*, the Court say that it is necessary for the inhabitants to have their recreation. If so, it is a matter of law, and though there may be precedents which state such customs to be for either the health or recreation of the inhabitants, yet when the Court lay it down that recreation is necessary, it is not necessary to be averred in pleading. As to the objection, that it is not stated that the defendant Chatteris went into the *locus in quo* for his recreation, the words of the plea are, that "he entered into the said close in which, &c., for the purpose of exercising and playing at divers lawful games, sports, and pastimes, and at those several times respectively there played at the said game of cricket, and the said other games, sports, and pastimes, &c." Now what are sports and pastimes but recreations? With respect to the case in *Bro. Abr. Custom*, pl. 46, there the custom was holden to be bad, not because it was for the fishermen of Kent to dry their nets on the plaintiff's land (which the case in *Cro. Car.* shows to be good), but either because the digging in the soil, in order to pitch stakes to hang the nets upon, was unnecessary, or it tended to the destruction of the inheritance. But that is not the case here. There is no authority therefore to oppose the case in *Levinz*; and upon the whole I think that this custom is reasonable, and the plea good.

But I hold the other custom to be as clearly bad, as the first is good. How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom. And I perfectly agree, that no action could be maintained for interruption of it, any more than in the instance put by my Brother Bond of a highway. There must be [\* 399] therefore judgment for the defendant Chatteris on the first special plea, and for the plaintiff against the other two defendants.

HEATH, J. I am of the same opinion. The lord might have granted such a privilege as is claimed by the first custom, before the time of memory. As to the second, it is clearly bad, being for all mankind, and on that the case in *Fitzgibbon*, 51, is in point.

ROOKE, J. There seems to me no objection to the first custom, and no ground for the second.

**Wilson v. Willes.**

7 East, 121–128 (s. c. 3 Smith, 167; 8 R. R. 604).

*Custom. — Common Rights Claim destructive of Common.*

A custom that all the customary tenants of a manor having gardens, [121] parcels of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements.

Trespass for breaking and entering the close of the plaintiff, called Hampstead Heath, in the parish of St. John, Hampstead, in Middlesex, and digging certain turf of the plaintiff, there being viz., 100 square yards of the plaintiff's turf, then covered with grass, and fit for the pasture of cattle, of £20 value, and carrying away and converting it to the defendant's use. Plea 1. Not guilty of the force, &c.; and as to the residue of the trespass, that the *locus in quo* is, and at the said time when, &c., was, and from time immemorial has been, a certain large waste situate within and parcel of the manor of Hampstead in Middlesex, within which manor there have immemorially been divers customary tenements demised and demisable by copy of Court rolls, &c., in fee-simple or otherwise, at the will of the lord, according to the custom of the manor; and that within the manor there has immemorially been an ancient custom, that all and every the customary tenants for the time being respectively of all and every the aforesaid customary tenements having a garden or gardens parcel of the same, have immemorially dug, taken, and carried away, and have been used and accustomed to dig, &c., in, upon, and from the said close, in which, &c., by themselves and their farmers and tenants \* respectively occupiers of such customary tene- [\* 122] ments with the appurtenances respectively for the time being, to be used and spent in and upon their said customary tenements with their appurtenances respectively, for the purpose of

making and repairing grass-plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent, every year, at all times in the year, as often, and in such quantity as occasion hath required, as to their said customary tenements with the appurtenances respectively belonging and appertaining. The plea then stated a grant from the lord of one of the aforesaid customary tenements, consisting of a certain messuage and garden, &c., parcel of the manor, to the defendant, his heirs, &c., at the will of the lord, &c., by virtue of which he entered, and was seised, &c., and that being so seised, &c., at the said times when, &c., being times when occasion required, he entered into the *locus in quo* in order to dig, take, and carry away, and did then and there dig, take, and carry away the said turf in the declaration mentioned, the same being then found in and upon the said close, to be, and which afterwards was used and spent in and upon his said customary tenement, &c., for the purpose of making two grass plots in the said garden, parcel of the same as aforesaid, for the improvement thereof; the same turf being then and there fit and proper to be so used and spent, and being such quantity as the occasion required, as he lawfully might for the cause aforesaid, &c. The 2d special plea alleged more generally the same right in the customary tenants to dig, take, and carry away the turf to be used and spent in and upon their customary tenements, &c., in and for the improvement of the [\*123] gardens, parcels of the same respectively; without \*confining the improvement to the making and repairing of grass plots therein. The 3d special plea alleged a similar right in the customary tenants to dig, take, and carry away, to be used and spent in and upon their customary tenements, for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences thereof respectively, such turf, covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, every year, at all times of the year, as often, and in such quantity as occasion hath required. A 4th special plea laid the custom still more generally to be for the customary tenants to take the turf from the *locus in quo* as often and in such quantity as the occasion required, to be used and spent upon their customary tenements respectively, for the improvement thereof. To all the special pleas there was a general demurrer, and joinder.

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Const, in support of the demurrer. The right set up, unlimited in its nature, and undefined in its terms, goes to the destruction of the whole common. It is not even confined to ancient gardens; for it is prescribed for every customary tenement having a garden parcel of the same; which may include a garden recently made. The turf may be taken at all times of the year for the making and repairing grass plots in such garden; which may comprise the whole garden, the extent of which need only be limited by the customary tenement itself and its appurtenances. It may be taken when occasion requires, of which the tenant is to be the judge. It is for the improvement thereof; a term of very large and doubtful signification, which may include all ornamental improvements. And the right is claimed for tenants and occupiers as well as for customary tenants. The custom stated in the [\* 124] second and subsequent special pleas is still more general and objectionable; extending to taking turf for the making and repairing of banks and mounds, hedges and fences, and for the improvement of the customary tenements generally. The common-law right of a commoner is confined to the taking of the grass by the mouths of his cattle (*vide* 45 Ed. III., 25, 26, and Bro. Common, 48 cites 12 H. VIII. 2, and *vide* 13 H. VIII. 15, 16), which right must be destroyed if the custom set up can exist: but it is a strong argument against its legality that no custom to the like extent is recognized in the books. In *The Dean and Chapter of Ely v. Warren*, 2 Atk. 189, it was considered by Lord HARDWICKE that a right in the tenants of a manor to dig turf in the extensive fen lands of Cambridgeshire, though it might be considered in such lands, which often lie under water for several years, to be no more than a compensation to the copyholder for the loss of his profit by grazing them, would be a very odd custom if applied to any other soil. The right of turbary is indeed very frequent: but that might be supposed to arise from necessity in times when other fuel was not easily procured; but even that, as Lord HARDWICKE observes in the same case, is confined to such a quantity as is sufficient for the house (*vide Tyringham's Case*, 4 Co. Rep. 37), to which the common is appendant. And he considered it as a great absurdity to lay the custom not only in the tenants, but in the occupants who, as tenants at will, could never have a right to take away the soil of the lord. And still more absurd is it to take turf fit for pasture for the purpose of making



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banks and fences. In *Wilkes v. Broadbent*, 2 Stra. 1224, and 1 Wils. 63, a custom set up for a lord of a manor, and his [\* 125] tenants, sinking pits for collieries in the freehold lands, to lay and continue the rubbish and materials, &c., on the lands of customary tenants near the pits, was holden void, as unreasonable and arbitrary and tending to defeat the copyholder of the whole profits of his land, and to destroy his estate: and there it was laid down, that if any part of the custom be bad, it is void for the whole. So here this custom is unreasonable; for it tends to defeat the purposes for which the common was made, and to destroy the whole estate.

Lawes, *contra*, contended that the custom was neither inconsistent with the right of common, nor unreasonable, nor uncertain. 1st, However inconsistent it may appear in the abstract, it appears that from all time it has existed in fact concurrently with the right of common. It is in its nature no more inconsistent with the right of common than the acknowledged right of turbary; and Lord Coke (Co. Litt. 122), in enumerating the several sorts of common, mentions, in addition to that of turbary, that of digging for coals, minerals, and the like: in all which the soil itself, as Blackstone (2 Black. Com. c. 3, tit. 3), observes, is lost to the lord; whereas here it is only transferred from one part of the manor to another. So in *Duberly v. Page*, 2 T. R. 391, the right of the tenants of a manor to dig gravel and sand on the waste was found for them; and this was not denied in *Shakespear v. Peppin*, 6 T. R. 741 (3 R. R. 330), or in *Peppin v. Shakespear*, 6 T. R. 748, to be a valid custom. This is not stronger than the case of *Hopkins v. Robinson*, 2 Lev. 2, where a prescription for the tenants to have *solum pasturam*, in exclusion of the [\* 126] lord, was holden good. \* But *non constat* there is any right of pasture in this case but subject to the other right.

2dly, The reasonableness of this custom must depend upon the degree of its interference with the lord's rights: for he is the only person who can object to it. But it is a good consideration as to him that the custom tends to the improvement of the lord's own estate in the hands of the tenants: of which he will have the benefit either in the shape of increased fines on the deaths of the tenants, if the fines be uncertain and dependent on the value of the copyholds, or at any rate upon the forfeiture or reverter of the estate. And it is material to observe, that the right can only be legally

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exercised where there is an improvement in fact of the customary tenement; of which the lord cannot justly complain. As to the objection that the custom is not alleged to be confined to the improvement in this manor of ancient gardens; supposing that were material, which does not seem to be necessary for the reason last mentioned, yet upon these pleadings it must be so understood; for it is laid that "every customary tenant of every the aforesaid customary tenements, having a garden parcel of the same, have immemorially dug, &c., turf to be used upon their said customary tenements for the purpose of making grass plots in the gardens, parcels of the same." Now this custom could not have been used immemorially for the purpose of improving the gardens, parcels of the customary tenements, if such gardens had not existed immemorially. [All the Court, however, denied this construction of the custom, as laid; and considered that it was claimed for any garden, parcel of the customary estate, whether ancient or not; they laid stress on the words, "having a garden," and "for repairing grass plots in the gardens;" not even saying the same gardens or ancient gardens.] As to the 3d special plea, he observed, that the right claimed was nothing more than a species of hedge-bote, which every tenant enjoyed. It was to protect the property and preserve the boundaries of the land, which was both convenient and reasonable. [Lord ELLENBOROUGH asked if there were any instance in the books of a custom to take away the soil of the lord to make bounds and banks for the tenant's estate; and especially to take that which was fit for the better purpose of pasture, and apply it to common and inferior purposes?] The Court then pressed him as to the uncertainty of the custom as laid. They asked what was meant by the word "improvement;" whether as applied to land it was not always confined to agricultural purposes? They observed that the claim was to take the turf when occasion required; and asked whether any precedent could be produced of pleading in so loose a manner the claim of any species of agricultural improvement: the occasion here was not confined to agricultural purposes; it might be for the purpose of building a summer-house. It was not confined to necessary repairs; it would extend to any fanciful repairs. (No answer being given to these suggestions,)

Lord ELLENBOROUGH, C. J., said: A custom, however ancient, must not be indefinite and uncertain; and here it is not defined

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what sort of improvement the custom extends to: it is not stated to be in the way of agriculture or horticulture: it may mean all sorts of fanciful improvements; every part of the garden may be converted into grass plots, and even mounds of earth raised and covered with turf from the common; there is nothing to restrain [\* 128] the tenants from taking the whole of the turbary \* of the common and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom, as laid, but caprice and fancy. Then this privilege is claimed to be exercised when occasion requires. What description can be more loose than that? It is not even confined to the occasions of the garden. It resolves itself, therefore into the mere will and pleasure of the tenant, which is inconsistent with the rights of all the other commoners, as well as of the lord. The third special plea also is vastly too indefinite: it goes to establish a right to take as much of the turf of the common as any tenant pleases for making banks and mounds on his estate; it is not even confined to purposes of agriculture. All the customs laid therefore are bad, as being too indefinite and uncertain.

The other Judges concurred.

*Judgment for the Plaintiff.*

**Tyson v. Smith.**

9 Ad. & El. 406-426.

*Custom. — Reasonable. — Erecting Booth at Fair.*

[406] In trespass for breaking and entering plaintiff's close, and erecting stalls, booths, &c. there, defendant justified under a custom that, at fairs holden at certain times of the year, on some part of the commons and waste of a manor, to be named by the lord of the manor (the *locus in quo* being parcel of such commons and waste, and named by the lord), every liege subject exercising the trade of a victualler might enter at the time of the fairs, and, for the more conveniently carrying on his said trade, erect a booth, &c., and continue the same for a reasonable time after the fairs, paying 2*d.* to the lord.

*Held*, that the custom was reasonable, and the plea a good justification in trespass brought by the owner of the soil.

And that the word "victualler" was to be understood in the sense which it bore at the time of the plea pleaded.

Trespass for (among other trespasses) breaking and entering plaintiff's close, treading down the grass, and placing and erect-

ing stalls, posts, booths, and tables on the said close, and continuing them without the leave, &c.

Third plea, as to the trespasses above specified, that, from time whereof, &c., on certain days (*viz.*, on Monday next after the feast day of Pentecost, and afterwards on each alternate Monday in each and every year, until the feast of All Souls), fairs, for the buying and selling of all kinds of goods, wares, and merchandises, have been, and of right ought to have been, and still of right ought to be, holden on the commons and waste grounds of the manor, lordship, or forest of Westward, in the county of Cumberland, that is to say, on some part thereof appointed for that purpose, from time to time, by the lord of the said manor, &c., for the time being. And that, from time whereof &c., there hath been, and of right, &c., and still of right, &c., an ancient and laudable custom within the said manor, &c., *viz.*, that every liege subject of this \*realm exercising the trade [\* 407] or calling of a victualler, at a reasonable time before the Monday next after the feast day of Pentecost, in each and every year, hath, during all the time aforesaid, been used and accustomed to enter, and of right, &c., and still of right, &c., into and upon that part of the said commons or waste grounds, from time to time appointed for holding the said fairs by the lord of the said manor, &c., and, for the more conveniently carrying on his said trade or calling to erect a booth and stall, and to put and place posts and tables there, and to keep and continue the said booth, stall, posts, and tables so erected, &c., from henceforth until a reasonable time after the last of the said fairs, yielding and paying therefor to the lord the sum of 2*l.*, when lawfully demanded. Averment, that the close in which, &c., at the times when, &c., was parcel of the said commons or waste grounds, and, before the first of the said several times when, &c., had been appointed by the Earl of Egremont, the lord for the time being, as the place for holding the said fairs, &c.: and the plaintiff, at the said times when, &c., held and occupied the close in which, &c., as tenant thereof to the said earl, &c. Wherefore defendant, being a liege subject, &c., and exercising the trade or calling of a victualler, for the purpose of erecting a booth &c. (justification under the custom).

Fifth plea, as to the same trespasses, that, from time whereof, &c., until the making of the award after mentioned, fairs, for the



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buying and selling of all kinds of goods, &c., have been, and of right ought to have been, holden on the commons or waste grounds of the said manor, lordship, or forest, viz., on some part thereof appointed for that purpose from time to time by the [\* 408] \*lord of the said manor, &c., on, &c. (stating the days as in the third plea): that, from time whereof, &c., until the making of the said award, there had been, and of right ought, &c., an ancient and laudable custom, used and approved of within the said manor, &c. (setting out a custom corresponding with that in the third plea) That afterwards, and before any of the said times when, &c., to wit, 6th May, 51 G. III. (1811),<sup>1</sup> an Act passed for enclosing lands in the said manor, lordship, or forest, by which commissioners were appointed for setting out, dividing, allotting, and enclosing the commons and waste grounds in the said Act mentioned, according to the rules, &c., contained therein and in the General Inclosure Act, stat. 41 G. III. U. K. c. 109., and it was enacted that the commissioners should set out and appoint unto the Earl of Egremont, his heirs and assigns, lord or lords of the said manor, &c., for the time being, in some proper and convenient place within the said manor, &c., a sufficient quantity of land (not exceeding forty acres) off and from the said commons and waste grounds, for the purpose of keeping and holding fairs thereon annually, according to ancient custom; and, subject thereto, the herbage of the said land so set out should belong to, and be enjoyed by, such person or persons, and in such manner, &c., as the commissioners should appoint: averment that the commissioners, by their award, in pursuance of the Act, set out and appointed to the said Earl of E., his heirs and assigns, lord or lords of the said manor, &c., for the time being, in a proper and convenient place within the said manor, &c., situate, &c., [\* 409] forty acres, off and from the said \*commons and waste grounds, for the purpose of keeping and holding fairs thereon annually, according to ancient custom, of which forty acres the close in which, &c., at the times when, &c., was, and is, parcel: averment that, from the time of the making the said award hitherto, every liege subject of this realm exercising the trade or calling of a victualler, at a reasonable time before the Monday, &c., hath been used, &c. (as in the third plea, only stating the entry to be on the close in which, &c., being parcel of the forty

<sup>1</sup> Stat. 51 G. iii. c. liii. (local and personal, public).

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acres awarded for the purpose of holding fairs), and, for the more convenient carrying on his said trade or calling, to erect a booth, &c. (as in the third plea): wherefore the said defendant, being a liege subject, &c. (Justification under the right claimed in this plea.)

The replication traversed the existence of the customs set forth in the third and fifth pleas. Upon these traverses issue was joined; and several other issues in fact were also joined. On the trial before Lord ABINGER, C. B., at the Cumberland Summer assizes, 1835, a verdict was found for the defendant on the issues upon the traverses to the third and fifth pleas, and for the plaintiff on all the other issues. A rule was obtained in the Queen's Bench to enter judgment for the plaintiff, *non obstante verdicto*, which was discharged in Easter term, 1837.<sup>1</sup> Judgment having been entered in that Court for the defendant, error was brought in the Exchequer Chamber.

The case was argued in this vacation, 3d December, \* 1838, before TINDAL, C. J., BOSANQUET, COLTMAN and [\* 410] VAUGHAN, JJ., PARKE, ALDERSON and GURNEY, BB.

W. H. Watson, for the plaintiff in error (the plaintiff below). The custom set out in the third and fifth pleas is bad. First, the description of persons by whom it is to be enjoyed is unlimited; for the words "every liege subject of this realm exercising the trade or calling of a victualler" would comprehend any one who chose to sell victuals. The word "victuallers" is now ordinarily applied to one who keeps a public-house: but that restriction of the meaning is modern, as appears from the uses of the word in Com. Dig. Justices of Peace, (B 87), (B 89). In 1 stat. 13 R. II. c. 8, the word is used for all persons supplying meat or drink, and answers to the expression "sellers of all manner of victuals" in stat. 23 Ed. III. c. 6. In stat. 7 R. II. c. 11, vintners and victuallers are separately mentioned. The custom here is not even limited to those who have exercised the trade for any given time. [PARKE, B. No one could enter without being a victualler: it seems, therefore, that the custom is limited to those who have already exercised the trade.] That is still too large a class: any

<sup>1</sup> See the argument and judgment, *Tyson v. Smith*, 6 Ad. & El. 745. In that report the issue on the third plea only is said to have been found for the defendant; and this was the assumption on which the judg-

ment proceeded. It will be seen, by the judgment in the present case, that the difference does not affect the principle of the decision.

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one might begin the trade the moment before entering. If the meaning be that any one may use the land for the purpose of the trade, then the plea is bad; for that right would be not by custom, but general law, supposing it to exist at all. In *Fitch v. Rawling*, p. 305, *ante*, 2 H. Bl. 393; 3 R. R. 425 (where a custom for all persons, for the time being, being in a parish, to exercise lawful games on the soil of an individual, was held bad), BULLER, [\*411] J., said, "How \*that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom." A plea of a custom among merchants throughout England, that one merchant may assign to another the king's license to lade wine in a strange ship, is bad; the right alleged being by common law, if at all, and not by custom. Bro. Abr. *Customes*, 59; 7 Vin. Abr. 175, *Custom (P)*, pl. 5. Here, it is true, the custom is to be exercised only in a particular place; but, as it is to be exercised, practically, by all the liege subjects, the objection applies. [BOSANQUET, J. Where the owner of a soil is entitled to toll traverse, any one may go.] That is from a qualified dedication to the public by the owner of the soil: it is not like a custom: and, if the right here be treated as analogous to an easement, the plea is bad. A right in the occupiers of a close to use a way cannot be laid as a custom, but must be prescribed for. *Baker v. Brereman*, Cro. Car. 418. It is true that in the old books there occasionally appears a confusion between prescription and custom; for sometimes the word "custom" is applied to a right to profit *à prendre* in the soil of another, which must be prescribed for. A way of necessity to go to a church, or to a market, is matter of prescription: so is a right for inhabitants of a vill to dance in the soil of an individual, such as was pleaded in *Abbot v. Weekdy*, 1 Lev. 176. It has been supposed that a custom was claimed for the men of Kent, after fishing, to dig in the land adjoining the sea, and pitch stakes for [\*412] hanging their nets to dry. Bro. Abr. \**Customes*, 46. But, on reference to the Year Book, Mich. 8 Ed. IV. 18 B., pl. 30, which is the authority cited in Brooke, it is clear that the decision there was not on a custom but on a common-law right. [ALDERSON, B. It is treated as a custom in the judgment of HOLROYD, J., in *Blundell v. Catterall*, 5 B. & Ald. 268, see p. 296,

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297 (reported in 24 R. R.), which is one of the ablest judgments ever pronounced in Westminster Hall.] It certainly is so treated, both by HOLROYD, J., and by Hale, De Port. Mar. 86. But CHOKE, C. J. of C. P., says that the custom cannot be good, because it is against common law to prescribe to dig in the soil of another, though, he says, there are other customs used throughout all the land which are legal. LITTLETON, J., says that a custom which runs through the whole land is common law; but that the alleged custom in question is against reason, because under it the whole meadow might be destroyed. DANBY, J., says that fishermen may justify going on the land adjoining the sea, because the fishery is for the common weal, and therefore, he says, this is common law. And CHOKE, C. J., afterwards adds that, as every one may fish in the sea of common right, so perhaps, at ebb tide, digging between the high and low water marks may be justified. It is clear that the whole discussion was upon the general right.<sup>1</sup> HOLROYD, J., goes no farther than to lay down that such a right, if supportable at all, must rest upon a particular custom; that was enough to show that the case did not bear out the plea in *Blundell v. Catterall*, which was on the \*com- [\* 413] mon law. In Brooke's Abridgment many rights are called customs which are by common law; such as the right to turn a plough upon the headland, which is matter of general law, *per* BRIAN, C. J. of C. P.<sup>2</sup> "A custom which may be general, and extend to all the subjects in England, and is not warranted by, but contrary to the common law, is void." 7 Vin. Abr. 189; Customs, (H), pl. 30, citing *Sherborn v. Bostock*, Fitzgib. 51. Further, the custom, as here set out, is incompatible with the existence of the fair. From 2 Inst. 219, 220, it appears that fairs were considered to be of great importance for the purpose of affording the means of selling and purchasing. The owner himself could grant for stalls only so much soil as would leave room for the market. *Rea v. Burdett*, 1 Ld. Raym. 148. But, as this custom is pleaded, stalls might be erected to any extent. It was

<sup>1</sup> It seems that the general right came into question in consequence of an objection taken to the plea, that it laid the right in the men of Kent generally, so as to amount to an assertion of a general common-law right; whence it was inferred that the plea would fail unless such general right existed.

<sup>2</sup> Bro. Abr. Customes, 51. Citing Yearb. Pasch. 21 Ed. IV. fol. 28, b. pl. 23. See Yearb. Pasch. 22 Ed. IV. fol. 8, b. 24; 7 Vin. Abr. 174, Custom (P), pl. 4, lb. 183, Customs (F), pl. 1.



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said, in the argument below, that the Court would intend that the use would be reasonable; but such an answer might be given in every case of unreasonable custom. A plea of approvement under the statute of Merton, 20 H. III. c. 4., must show that pasture was left for the commoners. And a custom for the lord of the manor to grant leases of the waste of the manor without restriction is bad. *Badger v. Ford*, 3 B. & Ald. 153 (22 R. R. 331); *Arlett v. Ellis*, 7 B. & C. 346. So a prescription for common appurtenant *sans nombre*, not limited to cattle levant and couchant, is bad on general demurrer; notes (4) and (k) to *Earl of Manchester v. Vale*, 1 Wms. Saund. 28 a; *Potter v. North*, 1 Saund. 352. After verdict it might be intended that the cattle had been proved [\* 414] to be levant and couchant; but here the \* custom must be bad or good as set out on the record. In *The Mayor, &c. of Northampton v. Ward*, 1 Wils. 107; 2 Str. 1238, the objection urged against the present custom was applied successfully to the existence of a common-law right to erect a stall in a market. Further, the time is claimed too largely. A reasonable time before and after the fair is beyond what can be warranted by custom. And at any rate, such a custom cannot be good as against the owner of the soil. The right to go on the land of another is an easement. This is in the nature of a *profit à prendre*, which cannot be claimed by custom. *Grimstead v. Marlowe*, 4 T. R. 717 (2 R. R. 512). See *Blewett v. Tregonning*, 3 Ad. & El. 554, *Gateward's Case*, 6 Co. Rep. 59 b. The land is broken to fix the posts; the owner loses his land, and the consequence arises which was suggested by LITTLETON, J., in Yearb. Mich. 8 Ed. IV. 18 B., pl. 30, that all the use of the land might be taken from the owner: for this there must, at least, be a prescription. It may perhaps be contended here that the record does not show any digging in the soil; but it shows, at any rate, as complete an exclusion from the land as that would. In fact, however, the language of the declaration clearly implies a breaking of the soil. Rights to be exercised in the soil of another are confined to the inhabitants of the particular district within which the right is to be exercised. It is true that a copyholder may claim common within the manor by custom, not being able to prescribe for it by reason of the feebleness of his estate: but, out of the manor, he cannot claim by custom, and must prescribe in the name of his lord. Note (11) to *Potter v. North*, 1 Wms. Saund. 349. *Taylor v. Drey*, 7 Ad.

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& El. 409, is an instance in which a custom was \* held bad because too large a right was claimed in *alieno* [\* 415] *solo*. It was said, in *Fitch v. Rawling*, p. 305, *ante*, 2 H. Bl. 395 (3 R. R. 425), that there might be a right, by custom, to water cattle at a watering place: but *Pain v. Patrick*, 3 Mod. 294, which is referred to for this, does not warrant the doctrine. It is important to keep in view the distinction between a claim to set up stalls, on paying stallage, and a claim to enter the land for the purposes of the fair. Tolls are not necessarily incident to a fair, though by custom or charter they may be claimable by the lord; but stallage is a right in the owner of the soil, not in the character of lord of the fair, to take compensation for the use of his land; and such stalls cannot be erected merely as incidental to the fair, without license from the owner of the soil. In *The Mayor, &c. of Northampton v. Ward*, 1 Wils. 107; 2 Str. 1238, LEE, C. J., said, "A market might not improperly be compared to a parish church, whither all the parishioners have a right to go to hear divine service, but have not liberty to furnish themselves with pews without the appointment of the ordinary; and the reason of the law being so, is for avoiding confusion and disorder in public meetings and assemblies; and that no case had been cited, nor could he find any in the books, to show that a man, coming to a market, had a right to erect a stall without license from the owner of the soil." Where a fair is granted to one and his heirs on land which is borough English, the stallage will go to the youngest son, but a fair to the common-law heir. *Heddy v. Welhouse*, Moore, 474. This shows that a custom cannot be reasonable, which would enable those using the fair to exert a right against one who may be owner of the soil and not lord of the fair.

\* The judgment below shows no ground for the decision. [\* 416] It is there said that there was an absence of authority for the argument on behalf of the plaintiff: but it appears that numerous authorities were adduced which, in principle, showed the invalidity of the custom. It is said also, that the description of victuallers is sufficiently definite. [BOSANQUET, J. Must we not take it that the word is used in the sense which it bore at the time of pleading the plea?] If the word be confined to its modern statutable sense, the custom, which is laid as immemorial, cannot exist. It is also said that the owner may be excluded from his own soil by a reasonable custom: but no such custom would be reasonable.

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Cresswell, for the defendant in error (the defendant below). It appears by the fifth plea that the Legislature has recognised the market, with the custom attached to it. The Court, after verdict, will hold the custom good, if it be capable of any explanation which will make it legal. It does not follow, from there being now no apparent reason for a custom, that there never was: this was said in *Hir v. Gardiner*, 2 Bulstr. 195, where Lord COKE cited the maxim *qui rationem in omnibus querit, rationem destruit*. In *Cocksedge v. Fanshaw*, 1 Doug. 132, Lord MANSFIELD adopted a similar principle. It is said that the custom here is unrestrained. But it is confined to a particular class, victuallers. The parties must be victuallers before they exercise the right. It is said that any one may become a victualler: but the same objection might be made to almost any limitation, as inhabitants of a town. It is also objected that the custom is bad as against the lord. But the lord has a recompense, the sufficiency of which cannot be [\* 417] discussed by the Court. Besides, the \*defendants do not

claim several right as against the lord. In the case in Bro. Abr. Customes, 46, and Yearb. Mich. 8 Ed. IV. 18 B., pl. 30, two rights came in question: first, the common-law right to fish in the sea, and possibly, as incidental thereto, to land fish on the shore; secondly, the right to dry nets and fix stakes for the purpose. The latter was held a bad custom, so far as concerned the breaking the soil, as destroying the inheritance. Here the custom does not destroy the inheritance; for it does not appear that the soil will be broken. It is argued that even toll is not necessarily incident to a fair, but depends on custom or grant. [PARKE, B., referred to *Holloway v. Smith*, 2 Str. 1171, and *Bennington v. Taylor*, 2 Lutw. 1517.] Here the claim rests entirely on special custom. It is true that there is no common-law right to erect a stall in the fair, but that the lord's license must be had. *The Mayor, &c. of Northampton v. Ward*, 1 Wils. 107; 2 Str. 1238. But the lord might have granted it at any time, with or without remuneration; and that would have been a good origin of a custom. [COLTMAN, J. It is difficult to see how there could be a grant to victuallers as a body. PARKE, B. Custom supposes a local law. TINDAL, C. J. If there were a grant, it would be a prescription.] LEE, C. J., said, in the last cited case, that, if the frequenter of the market "requires any particular easement or convenience, as a stall in the market, he must have the license

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of the owner of the soil for that purpose, if there be no particular sum fixed by the custom of the market for stallage; if there be a fixed sum or duty by custom, that cannot be exceeded, but still he must agree with the owner of the soil." Spelman, in Gloss., verb. *Stallangiator*, there cited, is to a similar effect. Now here the verdict finds a fixed sum under the special \* custom. [\* 418] *Rec v. Burdett*, 1 Ld. Raym. 148, shows only that it is extortion in the lord to let stalls to such an extent as to prevent the proper use of the fair, and then to demand money for them. It does not even appear that he might not have lent them gratuitously to any extent. Then, as to the length of time. If a custom may exclude the owner of the soil for one month, why not for two? If the time be very great, that may be a good reason for disbelieving the existence of such a custom in fact, but not for holding the custom bad. The compensation may be adequate. It does not appear that there was any compensation in the case of the custom which was held good in *Fitch v. Rawling*, p. 305, *ante*, 2 H. Bl. 393 (3 R. R. 425). There the recreation was to be at all seasonable times: it might have been as well said there, as here, that the time was too largely laid, and that the owner might be excluded from his soil. Then as to the alleged obstruction of the public. There is no such general rule as that suggested, that the right must be laid in the inhabitants of the particular district. This objection is merely the one before discussed, as to the extent of the meaning of the word "victualler." It is attempted to put this right on the footing of a *profit à prendre*; but it is more in the nature of an easement; nothing is taken from the soil. In *Rec v. Starkey*, 7 Ad. & El. 95, the claim of right to erect stalls in a market was not questioned, though no limitation was shown. The objection that the public may possibly be excluded by the erection of stalls might as strongly be urged against placing crates of earthenware, or letting cattle stand. *Budger v. Ford*, 3 B. & Ald. 153 22 R. R. 331, is inapplicable. There the lord had done an act inconsistent with the enjoyment of the common, \* he having himself granted the copyhold to which [\* 419] the right of common was annexed. If this objection be good, the plaintiff should have replied excessive user.

W. H. Watson in reply. The local Act recognises such customs only as were valid at the time. No instance has been shown of a person out of a manor claiming by custom within it. A copy-



holder claims so by prescription only. *Blewitt v. Tregonning*, 3 Ad. & El. 554, and especially the question of LITTLEDALE, J., there, 3 Ad. & El. 572, shows the importance of this distinction. [PARKE, B. (*Clarkson v. Woodhouse*, note (a) to *Bateson v. Green*, 5 T. R. 412, is against you.) The argument on the other side would, if tenable, support the custom which was held bad in *Fitch v. Rawling*, p. 305, *ante*, 2 H. Bl. 393 (3 R. R. 425). Neither prescription nor custom, which excludes the owner of the soil, can be good. Co. Litt. 122 a. *Ree v. Starkey*, 7 Ad. & El. 95, is inapplicable. [PARKE, B. That case decided only that a market was not properly removed unless the public were as well provided for as before.] As to the time; it could not be said that even goods might be left from fair day to fair day.

*Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the Court.

In this case, the issues raised on the third and fifth pleas, which go to the whole action, have been found for the defendant below, and judgment has been given thereon accordingly in his favour; and this writ of error is brought to reverse such judgment, [\* 420] on the \* ground that the custom set forth in those pleas, and upon which the whole of the defendant's justification rests, is unreasonable, and therefore bad in law.

The third plea (and it will be unnecessary to give a separate consideration to the fifth, as the same objections apply equally to both) begins by stating the existence of a fair by prescription to be held on some part of the commons and waste grounds of the manor of Westward, in the county of Cumberland, to be appointed for that purpose by the lord of the manor, on Monday after the feast of Pentecost in every year, and afterwards on each alternate Monday until the feast of All Souls; and then alleges a custom within the said manor, that every liege subject of the realm exercising the trade or calling of a victualler, at a reasonable time before the first day of the fair, has been used and accustomed, and of right ought, to enter upon that part of the commons or waste ground which had been set out for holding of the fair, and, for the more conveniently carrying on his trade, to erect a booth and stall, and to put and place posts and tables there, and to continue the same so erected, put, and placed until a reasonable time after the last of the said fairs so holden, yielding and paying therefor to the lord of the manor for the time being the sum of 2*l.*, when lawfully demanded.

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The plea then proceeds to justify the trespasses alleged to have been committed, under this custom. The existence of the prescriptive right to the fair is admitted upon the pleadings; and nothing is traversed but the existence of the custom, which custom is found by the jury. And the question before us is, whether the custom is a good custom, or unreasonable, and therefore void in law.

\* It is an acknowledged principle that, to give validity [\* 421] to a custom, — which has been well described to be an usage which obtains the force of law, and is, in truth, the binding law, within a particular district or at a particular place, of the persons and things which it concerns (see Davys's Reports, 31, 32, *Le Case de Tunistry*), — it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. Now of these several requisites to the validity of a custom, the only one which is brought in question on the present occasion is, whether the custom is reasonable or not; and this is a question which it belongs to the Judges of the land to determine.

The question, what customs are reasonable and what are not, is one upon which the books are not altogether silent. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for *consuetudo ex certâ causâ rationabili usitata privat communem legem* (Co. Litt. 113 a), as the custom of gavelkind and borough English, which are directly contrary to the law of descent, or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation.

But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant \* to the law [\* 422] of reason; for it could not have had a reasonable commencement; as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude and beneficial only to the lord. (Yearb. Trin. 2 H. IV. fol. 24 B., pl. 20.) So a custom that the lord of the manor shall have £3 for

every pound breach of any stranger (21 H. IV.<sup>1</sup>); or that the lord of the manor may detain a distress taken upon his demesnes, until fine be made for the damage, at the lord's will. (Litt. s. 212.) In all these, and many other instances of similar customs which are to be found in the books, the customs themselves are held to be void, on the ground of their having had no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate.

But the reasonableness of the custom in the present case is not impeached on any ground of this nature. The present custom is, in fact, in favour of the many; and the only party against whom it is set up, and by whom it is now opposed, is the lord of the manor. The grounds upon which this custom is contended to be void on the present occasion appear to be reducible to three.

First, that it is so general that it ceases to be a custom, or pleadable as such, but is part of the common law; secondly, that, by reason of its generality and extent, it cannot be carried into execution, and cannot therefore be considered as a reasonable [\*423] custom; and lastly, that the right claimed amounts \* to a *profit à prendre* out of land, and cannot therefore be claimed as a customary right.

As to the first objection, admitting, for the purpose of argument, that a custom which would comprehend within it all the liege subjects of the Crown would be bad, on the ground of its amounting to the common law, we think the custom before us is not of that description. For in the present custom there are three restrictions which necessarily limit its generality. The parties who claim the benefit of it must be victuallers; they must be victuallers coming to keep the fair; and they must come at the precise period of the year at which the fair is fixed.

Now, under the description of victuallers mentioned in the custom, we cannot consider that very large body of persons to be comprehended who, in ancient times, appear to have been classed under that designation by the statutes referred to in the argument. But we think the plea must be taken to speak in the language of the time at which it is pleaded; and, as the only term used is that of a victualler, it must be understood those only are comprehended

<sup>1</sup> This reference is given in *Le Case* A., pl. 61. See 7 Vin. Abr. 183, Customs, *de Tanistren*, Dav. 33*a*. The placitum (F) 7, and the references there given, meant is probably Mich. 21 H. VII. fol. 40 Yearb. Pasch. 21 H. VII. fol. 21 A, pl. 2.

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who are now so termed, that is, persons authorised by law to keep houses of entertainment for the public. This removes the case at once from the application of the case of *Fitch v. Rawling*, where the custom comprehended all the liege subjects of the Crown being in the parish at any time.

But it is said the number of these victuallers may be so large, and the space occupied by each so great, as that the whole portion of the common set out for the fair may be taken by them in exclusion of the rest. If \* this argument were to pre- [\* 424]vail, it is manifest that it would be equally applicable with respect to every particular branch of traders who frequent the fair. The sellers of corn, or of cattle, the persons who deposit their cloth, the dealers in earthen ware, and the like, might with equal show of reason be stated by possibility to become occupiers of the whole ground to the exclusion of the rest. But it is obvious that this is not an argument against the custom being reasonable in its original commencement, or against the prescription for the fair being a reasonable prescription: it is an objection only as to the mode of exercising the rights so claimed, whether under the custom or the prescription. An inconvenience of this description will provide its own remedy; if it occurs once, it will not be likely to occur again. It is in the highest degree improbable that it should ever occur at all. A little previous inquiry will at all times prevent its recurrence. And in *Bennington v. Taylor*, 2 Lutw. 1517, where it was contended that a prescription was uncertain, and therefore void, which claimed toll for stall, and the land *prope et circa stallum*, &c., the objection was not allowed; for this, it was said, "shall be ascertained by the common usage of the fair." And these are precisely the points of consideration to which the Judges must advert, when called upon to determine whether the custom is void or not. It is not void as being against law; and, if alleged to be void because inconvenient in a high degree in its enjoyment, and therefore unreasonable, they must look to the probabilities of the case, and be satisfied that the inconvenience is real, general, and extensive, before they \* hold a cus- [\* 425]tom bad upon that ground, which a jury have found to exist, and to have been acted upon from beyond the time of legal memory.

As to the objection, that this is a bad custom as against the owner of the soil; that all the authorities confine a claim under a



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custom to matters of easement only, whereas this is a matter of profit in *alieno solo*, inasmuch as the soil must be disturbed by the erection of the stall; admitting this to be the case, which is left extremely doubtful on the pleadings in this case, yet the distinction between this custom and others to which reference was made is, that it gives a certain profit to the owner of the soil for the use of the same; and whether that is a full compensation or not is not the question. At the early time at which this custom originated, it may have been a profit to the lord, and at all events it may have been an object to him with respect to the profits of his fair to give encouragement to those who would erect booths and stalls for the entertainment of strangers coming to the fair. It is clear that a prescription for a certain toll by way of stallage is good notwithstanding toll and stallage are different things; as was held in the case of *Bennington v. Taylor* above referred to; and, if the lord of the fair can justify distraining for such toll under a prescription, there seems no reason why the person who uses the stall on payment of the toll, and who cannot prescribe either in a *que* estate or in himself and his ancestors, being a stranger, should not justify under such a custom as the present.

The custom, in fact, comes at last to an agreement, [\*426] which has been evidenced by such repeated acts of \* assent on both sides from the earliest times, beginning before time of memory and continuing down to our own times, that it has become the law of the particular place.

We therefore think the custom set out on the pleading is a good custom, and affirm the judgment of Queen's Bench.

*Judgment affirmed.*

#### ENGLISH NOTES.

In *Hilton v. Grancille* (1845), 5 Q. B. 701, D. & M. 614, 13 L. J. Q. B. 193, 8 Jur. 310, an alleged custom of a manor for the lord of the manor, to work mines so as to let down houses, &c., paying compensation for the surface but not for the houses, &c., was held bad in law as being unreasonable.

In the case of *Sowerby v. Coleman* (1867), L. R., 2 Ex. 96, 36 L. J. Ex. 57, 15 W. R. 451, a custom was claimed for the inhabitants of the parish of L. to enter upon certain land within the adjacent manor of H. at all seasonable times for the purpose of exercising and training horses thereon. The alleged custom was held bad, on the ground that the place in which the right was claimed for the inhabitants of the parish

was outside the parish, and that the claim to exercise the right "at all seasonable times," which must mean at all times when the ground is not used as arable land, is too wide. The exercise of such a right would, in effect, be an exclusion for an indefinite period of the beneficial enjoyment of the owner, and would therefore be unreasonable.

In *The Mayor, &c. of London v. Cox* (H. L. 1867), L. R., 2 H. L. 239, 36 L. J. Ex. 225, 16 W. R. 44, an alleged custom of the City of London to attach a debt due to the defendant from any person found within the jurisdiction of the Lord Mayor's Court, was held bad by common law as incongruous, as setting up an accessory to a limited jurisdiction more extensive than the principal; and also as transgressing the Statute of Westminster the 1st, which was passed to remedy mischiefs arising from great men and their bailiffs who "by their own authority attach others passing through their jurisdiction with their goods, compelling them to answer upon contracts, covenants, and trespasses done out of their power and jurisdiction."

*Fitch v. Rawling* was followed and applied in *Hall v. Nottingham* (Ex. D. 1875), 1 Ex. D. 1, 45 L. J. Ex. 50, 33 L. T. 697, 24 W. R. 58, where a custom for the inhabitants of a parish to erect a maypole on certain ground of a landowner within the parish, and dance round and about the same, and otherwise enjoy any lawful and innocent recreation at any time in the year on the said ground, was held (by KELLY, C. B., CLEASBY, B., and AMPHLETT, B.) to be reasonable and lawful. The case of *Dyce v. Hay* below cited (1852), 1 Macq. H. L. Sc. 305, is referred to as giving the sanction of Lord ST. LEONARDS to this decision. Upon the expression, "dedicated to the public," KELLY, C. B., (doubtless justly) observed that Lord ST. LEONARDS must have meant "dedicated to the parish."

Where there is a right which can be established by evidence of user having presumably a lawful origin, one of various persons having similar interests may sue on behalf of himself and all other such persons. And it is not necessary for this purpose that all the persons should hold by the same title or tenure similarly. So one freehold tenant may sue the Lord of the Manor on behalf of himself and all other tenants of the manor in respect of rights of common to be exercised over the waste of the manor. *Warwick v. Queen's College, Oxford* (1870), L. R., 10 Eq. 105, 39 L. J. Ch. 636, 23 L. T. 63, 18 W. R. 719 (affirmed L. R., 6 Ch. 716, 40 L. J. Ch. 780, 25 L. T. 254, 19 W. R. 1098).

*Dyce v. Hay* (1852), 1 Macq. H. L. Sc. 305, was an appeal from Scotland which illustrates the distinction between a vague claim to use the soil of another for the purpose of recreation and exercise, and the limited and special right of enjoyment on a village green. In *Dyce v. Hay*, the pursuer (or plaintiff) claimed as an inhabitant of Aberdeen

and certain adjacent villages the right to go at all times upon a certain piece of enclosed ground lying between a footpath (alleged to be public) and the river Don, "for the purpose of recreation and taking air and exercise by walking over and through the same and resting thereon as they saw proper." It was decided that such a claim could not be established by proof of long usage. Lord ST. LEONARDS, L. C., said (p. 309): "Now that, I conceive, is a claim so large as to be entirely inconsistent with the right of property, for no man can be considered to have a right of property worth holding in a soil over which the whole world has the privilege to walk and disport themselves at pleasure." In effect, he observed, the usage was claimed for the public generally, although by the amended statement in the pleadings it was restricted to the inhabitants of certain popular places in the neighbourhood. On the other hand, he says (at pp. 310, 311): "There is one thing as to which I must particularly guard myself, and I must anxiously beg that the House may not be understood as expressing any adverse opinion; I mean that right to which the right in question in this case has been improperly assimilated; the right of village greens and village play-grounds, the enjoyment of which has been dedicated to the public. . . . it is now admitted to be clear that the law of Scotland in that respect agrees with the law of England. If there be a piece of ground unenclosed (not that I mean to say enclosure would make any difference unless there was an exercise of an adverse right), but I say, if there be a piece of ground unenclosed and dedicated from time immemorial to the public from which a custom may be laid for sports generally, or for village recreations, nobody, I trust, will suppose that such rights can be at all affected or disturbed by any decision at which your Lordships may arrive upon the present appeal. Those rights will remain untouched, and are unassailable, be the fate of this case what it may."

In *Allgood v. Gibson* (C. P. 1876), 34 L. T. 883, 25 W. R. 60, an action for trespass in which a justification by a custom was pleaded, it was held that "dwellers in a parish or manor" cannot acquire any right to a *profit à prendre*. The claim was afterwards amended so as only to extend to commoners; and at a subsequent trial a verdict was found for the plaintiff. A motion having been made to the Court of Appeal to set aside the judgment on the ground that the plaintiff had not shown a title to the *locus in quo*, the Court held that as he was shown to be in possession, this was sufficient title against a trespasser, who had shown no title in himself.

The right claimed in *Bourke v. Davis* (1889), 44 Ch. D. 110, 62 L. T. 34, 38 W. R. 167, was somewhat similar to that claimed in the Scotch case of *Dyce v. Hay*, in so far as the alleged right consisted in an indefinite kind of user by a person not belonging to a defined class.

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The defendant was a person who kept pleasure boats on a piece of land adjoining the river Mole, a tributary of the Thames. He claimed the right to use the river Mole between certain points above and below the plaintiff's land as a public highway. The plaintiff obstructed the waterway where it flowed through his land, by posts and chains. The defendant broke down the obstruction, and the plaintiff brought his action for an injunction. KAY, J., granted the injunction. He held that the right could not be claimed as a right of recreation by custom, which was carefully restricted by law. As a claim to a public right of way it was bad. There was no public termini, since there was no evidence of public access to the river at the points specified; and there was no evidence of the expenditure of public money for maintenance, such as might show a dedication to the public in the case of a road from which there was no exit at one end.

It may be safely assumed, in the present day, that the principle of *Wilson v. Willes*, that a custom in favour of the commoners which is destructive of the common, could not have a legal origin, may be applied to a claim of the lord tending to the destruction of the common.

There is, indeed, a decision of the King's Bench in 1793, *Bateson v. Green*, reported 5 T. R. 411, to the effect that a right claimed by a lord of the manor, and proved by evidence of 70 years user, to dig clay pits and to empower others to do so, without leaving sufficient herbage for the commoners, could be supported as good in law so as to oust the rights of the commoners. This decision has been questioned in recent times; and having regard to the modern tendency to hold a fair balance between the rights of the lord and the commoners, it is difficult to imagine any evidence by which such a claim could now be supported. In his judgment in *Robertson v. Hartopp*, which was affirmed by the Court of Appeal (1889), 43 Ch. D. 484, 59 L. J. Ch. 553, 62 L. T. 585, Mr. Justice STIRLING says (43 Ch. D. at p. 498): "The law as to the position of the lord has been stated by Vice-Chancellor HALL in a passage of his judgment in *Hall v. Byron*, 4 Ch. D. 667, 46 L. J. Ch. 297, which was accepted by Lord Justice FRY, as correct, in *Robinson v. Duleep Singh*, 11 Ch. D. 798, 48 L. J. Ch. 758. It is this — 'The law I consider to be that the lord may take gravel, marl, loam, and the like, in the waste, so long as he does not infringe upon the commoners' rights, his right so to do being quite independent of the right of approvement under the Statute of Merton or at Common Law, and existing by reason of his ownership of the soil subject only to the interests of the commoners.'" The decision in *Robertson v. Hartopp* itself tends much to minimize any such supposed rights on the part of the lord. For as it shows that the rights of the commonness having rights of pasture are to be measured, not by the number of beasts which they



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may in recent times have thought it worth while to pasture on the common, but according to the number which they are entitled to turn out; there are probably few pasturable commons affording a marginal area which the lord has a right to destroy.

As to the Statute of Merton above referred to, which has in times past covered many questionable inclosures, it is now enacted by 56 & 57 Vict. c. 57, s. 2, that "an inclosure or approvement under the Statute shall not be valid unless made with the consent of the Board of Agriculture."

In *Edwards v. Jenkins*, Ch. 12 Nov. 1895, 73 L. T. 574, Mr. Justice KEKEWICH held that an alleged custom of all the inhabitants for the time being of three adjacent parishes to a right of recreation over a place in one of them is bad.

#### AMERICAN NOTES.

The three principal cases are cited in Lawson on Usages and Customs, and their doctrine is approved and illustrated in a great number of citations.

The present writer, in Parol Evidence (sect. 59), laid down the rule: "Evidence is inadmissible to prove a custom or usage that is vague, inconclusive, unreasonable, or absurd, or that varies an express agreement, or infringes a sound rule of law." Substantiated by reference to *National Bank v. Burkhardt*, 100 United States, 686; *Barnard v. Kellogg*, 10 Wallace (U. S. Sup. Ct.), 383; *Insurance Co's. v. Wright*, 1 *ibid.* 470; *Rankin v. Am. Ins. Co.*, 1 Hall (New York), 619; *Groat v. Gile*, 51 New York, 431; *Pindar v. Count. Ins. Co.*, 36 *ibid.* 618; *Vail v. Rice*, 5 *ibid.* 155; *Frith v. Barker*, 2 Johnson (New York), 327; *Woodruff v. Merch. Bank*, 25 Wendell (New York), 673; *Dykens v. Allen*, 7 Hill (New York), 497; *Jones v. Hoey*, 128 Massachusetts, 585; *Davis v. Galloupe*, 111 *ibid.* 121; *Snelling v. Hall*, 107 *ibid.* 134; *Potter v. Smith*, 103 *ibid.* 68; *McKim v. Aulbach*, 130 *ibid.* 481; 39 Am. Rep. 470; *Dickinson v. Gay*, 7 Allen (Mass.), 29; *Greenstine v. Borchard*, 50 Michigan, 434; 45 Am. Rep. 51; *Sohn v. Jerris*, 101 Indiana, 578; *Franklin L. Ins. Co. v. Sefton*, 53 *ibid.* 380; *Spears v. Ward*, 48 *ibid.* 541; *Bailey v. Bensley*, 87 Illinois, 556; *Corbett v. Underwood*, 83 *ibid.* 324; *Smyth v. Ex's of Ward*, 46 Iowa, 339; *Randolph v. Hadden*, 44 *ibid.* 327; *Marks v. Cass Co. Mill Co.*, 43 Iowa, 116; *Randall v. Smith*, 63 Maine, 105; *Polhemus v. Heiman*, 50 California, 438; *Cooke v. England*, 27 Maryland, 14; *Wetherill v. Neilson*, 20 Pennsylvania State, 448; *Coxe v. Heisley*, 19 *ibid.* 243; *Schenck v. Griffin*, 38 New Jersey Law, 462; *Phoenix Ins. Co. v. Taylor*, 5 Minnesota, 492; *Missouri P. R. Co. v. Fagan*, 72 Texas, 127; 13 Am. St. Rep. 776; *Mut. Ass. Soc. v. Scottish U. &c. Co.*, 81 Virginia, 116; 19 Am. St. Rep. 819; *Columbus &c. Co. v. Tucker*, 48 Ohio State, 41; 29 Am. St. Rep. 528; *Jackson v. Bank*, 92 Tennessee, 154; 36 Am. St. Rep. 81; *Merchants' Ins. Co. v. Prince*, 50 Minnesota, 53; 36 Am. St. Rep. 626.

Therefore the following, for example, have been held bad: A custom of real estate brokers to charge commissions to both parties. *Raisin v. Clark*, 41 Maryland, 158; 20 Am. Rep. 66. That stock certificates, issued in the name of a trustee, and by him transferred in blank, are constantly bought and sold without inquiry. *Shaw v. Spencer*, 100 Massachusetts, 382; 1 Am.

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Rep. 115. On a contract to make a "satisfactory" suit of clothes, a custom to try on the garments after they were finished, and then to alter if necessary. *Brown v. Foster*, 113 Massachusetts, 136; 18 Am. Rep. 463. A custom, in respect to a marine policy, to exact a port warden's certificate that the goods were properly stowed and were damaged by perils of the sea in transit. *Rankin v. Am. Ins. Co.*, 1 Hall (New York), 619. To require a lessor to cleanse a house before the lessee takes possession. *Sauetelle v. Drew*, 122 Massachusetts, 228. To allow brokers to pledge or dispose of collateral stocks at pleasure, returning an equal number of shares of the same kind. *Dykens v. Allen*, 7 Hill (New York), 497. To deny days of grace on a bill of exchange. *Woodruff v. Merch. Bank*, 25 Wendell (New York), 673. Where articles for a whaling voyage authorized the master to displace any officer or seaman deemed by him incompetent, and reduce his lay, substituting another person, an usage never to disrate an officer to a seaman, but instead to discharge him. *Potter v. Smith*, 103 Massachusetts, 68. On a contract to cut stone for a building according to certain plans, usage to show that the owner of the building was to pay for necessary wooden patterns. *Davis v. Galloupe*, 111 Massachusetts, 121. On a contract to sell and ship potatoes, a custom to ship not to the purchaser but to the seller himself. *Sohn v. Jervis*, 101 Indiana, 578. To receive insurance premiums after they were due. *Franklin L. Ins. Co. v. Sefton*, 53 Indiana, 380. A custom exempting a canal carrier from liability for injury by dangers of navigation, fire, or unavoidable accident. *Coxe v. Heisley*, 19 Pennsylvania State, 243. Where notes of a third party were transferred in payment for goods, custom to show that the transferer incurred the liability of an indorser. *Paine v. Smith*, 33 Minnesota, 495. To show that the word "epidemics," in a life insurance permit to travel, included yellow fever. *Pohalski v. Mutual L. Ins. Co.*, 36 New York Superior Ct. 234; 56 New York, 640. To show that "standing detached," in a fire insurance policy, means at least twenty-five feet from any other building. *Hill v. Hibernia Ins. Co.*, 10 Hun (New York), 26. On a contract "to pay eight dollars per thousand for brick in the wall, custom to ascertain the number by measurement rather than by count." *Sweeny v. Thomason*, 9 Lea (Tennessee), 359; 42 Am. Rep. 676. On a contract to furnish a monument, including tablets, to show that the purchaser should select and furnish inscriptions. *Hedden v. Roberts*, 134 Massachusetts, 38; 45 Am. Rep. 276. To show that manufacturers and dealers in cigars do not rely on representations by brokers as to the responsibility of purchasers. *Fuller v. Robinson*, 86 New York, 306; 40 Am. Rep. 540. Where a bank pays a check drawn on it, to a bank in the same city, which it has received from a depositor, with a forged indorsement, usage of banks in that city imposing the duty on the former bank to examine and satisfy itself of the genuineness of the indorsement, and to return the check immediately to the latter bank if not good. *Corn Ex. Bank v. Nassau Bank*, 91 New York, 74; 43 Am. Rep. 655. On a contract to pay for plastering by the square yard, a custom to include in the measurement one-half the window space. *Jordan v. Meredith*, 3 Yeates (Penn.), 318. That owners of vessels at a particular port pay bills drawn by the master for supplies at foreign ports. *Bowen v. Stoddard*, 10 Metcalf (Mass.), 375. To pay seamen's advance wages to the shipping agent, to be paid to the boarding house keeper

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bringing in the seamen. *Metcalf v. Weld*, 14 Gray (Mass.), 210. On a contract to sell "stock on hand," to show that only part was intended, part not being owned by the seller. *Brady v. Cassidy*, 104 New York, 147. To accept inferior grades of goods sold at half price. *Larroe v. Lewis*, 44 Hun (New York), 226; 128 New York, 593. That stock-brokers regard certificates of deposit as negotiable. *East Birmingham Land Co. v. Dennis*, 85 Alabama, 595; 2 Lawyers' Rep. Annotated, 836. A carrier's custom not to accept goods except under a limitation of his common-law liability. *Missouri P. R. Co. v. Fagan*, 72 Texas, 127; 2 Lawyers' Rep. Annotated, 75. To disregard a statutory duty to fence a highway. *Molloy v. Walker Township*, 77 Michigan, 448; 6 Lawyers' Rep. Annotated, 695. To show that mining was conducted in the usual way, although injurious to others. *Columbus, &c. Co. v. Tucker*, 48 Ohio State, 41; 29 Am. St. Rep. 528; 12 Lawyers' Rep. Annotated, 577; observing that "a usage which is not according to law, though universal, cannot be set up to control the law," citing *Meyer v. Dresser*, 16 C. B., N. S., 646; nor "to show, as an excuse for defendant's negligence, a custom of others to be equally negligent." To show an usage to employ white-wood for counters contracted to be of walnut. *Greenstine v. Borchard*, 50 Michigan, 534; 45 Am. Rep. 51.

In *Fuller v. Robinson*, *supra*, it is said: "Evidence of a usage, or custom of trade, is frequently admitted to annex unexpressed incidents to contracts, or to explain ambiguous or doubtful phrases in written agreements. But reasonableness is one of the requisites of a valid usage, and an unreasonable or absurd custom cannot be set up to affect the rights of parties. Evidence of the custom of a particular trade is admitted to supply what is not expressed, or to explain what is doubtful, upon the presumption that persons engaged therein are acquainted with, and understand and tacitly assent, that their contracts shall be interpreted in the light of the recognized usages. But there is no ground for this presumption where the usage attempted to be shown is repugnant to common sense, or is based upon a disregard of the relations which exist between men, or the duties which in law or morals they owe to each other."

"Certainty is one of the requisites of a good custom." *Union R. Co. v. Yeager*, 34 Indiana, 1; *Wallace v. Morgan*, 23 *ibid.* 399. This requisite was found lacking in respect to a custom of innkeepers to require guests to deposit their money in the inn safe. *Berkshire Woollen Co. v. Proctor*, 7 Cushing (Mass.), 117. See *Murray v. Spencer*, 24 Maryland, 520; *Huston v. McArthur*, 7 Ohio, 421; *Baltimore, &c. Co. v. Pickett*, 78 Maryland, 375; 22 Lawyers' Rep. Annotated, 690; *Pickering v. Weld*, 159 Massachusetts, 522.

The rule that no custom can avail against a statute, as for example, a custom to take illegal interest, is undeniable. *Dunham v. Day*, 13 Johnson (New York), 40. And it is equally well settled that a custom in derogation of an established rule of the common law is invalid. Lawson on Usages and Contracts, sect. 226. Thus in *Barnard v. Kellogg*, 10 Wallace (U. S. Sup. Ct.), 383, it was held that custom could not avail against the rule of *carveat emptor*. The Court said: "And it is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the State is divided,

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leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made." In *Frith v. Barker*, 2 Johnson (New York), 327, Chief Justice KENT said, "Usage . . . never is, or ought to be, received to contradict a settled rule of commercial law."

The list of cases to substantiate these propositions might be greatly extended, but to no useful end, as they have been very exhaustively illustrated by Mr. Lawson.

The same doctrine is to be found in *Cranwell v. Ship Fosdick*, 15 Louisiana Annual, 436; 77 Am. Dec. 190, in respect to carriers; and in *Freight, &c. Co. v. Stanard*, 44 Missouri, 71; 100 Am. Dec. 255, where it is said: "A custom, to be good, must be general, uniform, certain, and notorious; . . . is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law."

In *Hopper v. Sage*, 112 New York, 530; 8 Am. St. Rep. 771, it was held that evidence of custom of the stock exchange is inadmissible to show that dividends declared payable in future do not belong to the owner of the stock.

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(C. P. 1863.)

## RULE.

A RIGHT to a profit *in alieno solo* cannot be claimed by custom; nor can such right be claimed by persons under an indefinite description such as "the inhabitants" of a township, unless under the presumption of a grant which would incorporate them.

*Constable v. Nicholson.*

32 L. J. C. P. 240-244 (s. c. 14 C. B. (N. S.) 230; 11 W. R. 698).

*Custom. — Easement. — Profit à prendre.*

The right for the inhabitants of a township to take stones from the [240] land of another person for the purpose of repairing the highways, is a *profit à prendre*, and cannot therefore be claimed by custom: neither can it be claimed by prescription, as inhabitants are incapable by that description of taking such an easement, unless under a grant which would incorporate them.

The declaration stated that the defendant broke and entered certain land of the plaintiff, being part of the sea-shore between high water-mark and low water-mark in or adjoining the townships of



Owthorne and Withernsea, within the seigniori of Holderness, in the county of York, and took, got, and dug up from and out of the said land divers quantities of gravel, sand, stones, cobbles, ballast, sea-weed, and other materials of the plaintiff there being, and converted the same to the defendant's own use.

The sixth plea stated that the defendant, at the time of the alleged trespasses, was one of the inhabitants of the said township of Owthorne, in the said county of York, and that from time whereof the memory of man was not to the contrary, and at the time of the said alleged trespasses the inhabitants of the said township had been used and accustomed to have and enjoy, and of right ought to have and enjoy, and still of right ought to have and enjoy the right to enter upon the said land of the plaintiff, being the sea-shore between high and low water-mark adjoining the said township, by themselves and their servants, with horses and carts for the purpose of digging and getting from and out of the said land of the plaintiff gravel, sand, stones, cobbles, ballast, sea-weed and other materials, and carrying away the same for the purpose of amending and repairing the highways in the said township when and so often as need and occasion required. And the plea stated, that the defendant, being one of the inhabitants of the said township, with the consent and by the direction of the other inhabitants, committed the said alleged trespasses for the purpose of doing certain necessary repairs to certain highways in the said township, and that the said stones, cobbles, gravel, sand, ballast, sea-weed and other materials were used in such repairs.

The seventh plea alleged in like manner a custom of the inhabitants of the township of Withernsea to enter and dig [\* 241] for gravel, and justified committing the trespasses as \* the servant and by the direction of such inhabitants.

The eighth plea stated that the inhabitants of the said township of Owthorne for thirty years before this suit enjoyed as of right and without interruption, the right to dig and take gravel, sand, stones, cobbles, ballast, sea-weed and other materials from the seashore between high and low water-mark adjoining the said township, for the purpose of repairing the highways in the said township when need and occasion required. And the said plea alleged that the defendant at the time of the said alleged trespasses was an inhabitant of the said township of Owthorne, and that he with the consent and by the direction of the other

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inhabitants of the said township committed the said alleged trespasses in the exercise of the said right.

The ninth plea was the same as the eighth, except that the period of sixty years was substituted for that of thirty years.

The tenth and eleventh pleas in like manner alleged an enjoyment as of right for thirty and sixty years by the inhabitants of the township of Withernsea, and justified committing the trespasses as an inhabitant and as the servant and by direction of such inhabitants.

The twelfth and thirteenth pleas respectively alleged a custom, the twelfth plea for the overseers of the highways of the said township of Owthorne, and the thirteenth plea for those of Withernsea, being the persons charged with the repairs of highways in the said townships respectively, to enter and dig for gravel, &c., as stated in the sixth and seventh pleas, and justified committing the trespasses as the servant and by the direction of such overseers.

Demurrer to the said sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth pleas, and joinder therein.

Kemplay, in support of the demurrer. — The question raised by these pleadings is, whether the defendant has a right to take part of the sea-shore for the purpose of repairing the highways. The sixth, seventh, twelfth and thirteenth pleas justify such taking under a custom; but, according to all the authorities, from *Gatward's Case*, 6 Co. Rep. 59 b. (No. 14 of "Easements," *post*), downwards, such right, being a *profit à prendre*, cannot be claimed by custom. The other side will probably rely on a *dictum* of ALDERSON, B. in *Padwick v. Knight*, 7 Ex. 854; 22 L. J. Ex. 198. That case decided that a surveyor of highways could not justify a trespass under a prescriptive right, or a custom to take stones from the waste, whether adjoining the sea-shore between high and low water-mark, or otherwise, for the purpose of repairing the highways of the parish; but it was there observed, by ALDERSON, B., that "assuming that such a prescription is good, it ought to be pleaded as an immemorial custom for the inhabitants of the parish to take stones from the waste for the purpose of repairing the highways, averring that the surveyors were two of the inhabitants, as was done in *Johnson v. Wyard*, 2 Lutw. 1344." Such observation, however, was only an opinion of that learned Judge, and he states it doubtfully, saying "assuming that such a prescription is

good." The case of *Blewitt v. Tregonning*, 3 Ad. & E. 554, is directly in point; that case shows that a custom for the inhabitants of a parish to take sand which had drifted from the sea-shore upon the plaintiff's close for the purpose of manuring land in their occupation was bad, because the right claimed under it was to take a profit *in alieno solo*.

[BYLES, J. Who is to release it?]

Precisely so; no one can. In note (3) to *Mellon v. Spateman*, 1 Wms. Saund. 340 d, it is said, "The defendant must either prescribe in the corporation for the right of common as he has done here, or else that he and all those whose estate he has in a house in the borough have used to have common; but it cannot be claimed by custom that every tenant, inhabitant, or occupier of any messuage within the borough has been used to have common. For it is settled that where an interest or *profit à prendre* is to be claimed out of another man's soil it must be alleged by way of prescription, and not by custom, unless in the case of a copyhold tenant against his lord. And one chief objection against [\* 242] claiming such a right by \* custom is, that it cannot be released." BULLER, J., also observes, in *Grimstead v. Marlowe*, 4 T. R. 717 (2 R. R. 512), that "one objection to the claiming such a right by custom is, that it cannot be released." The case of *The Mayor and Commonalty of Lynn Regis v. Taylor*, 3 Lev. 160, comes within the exception where the right may be claimed by custom. There a custom for freemen and proprietors of ships within a borough to dig gravel on the shore for ballast was held good as being for the maintenance of navigation. But in *Wilson v. Willes*, No. 4, p. 311 *ante*, (7 East, 121, 3 Smith 167, 8 R. R. 604), a custom for all the customary tenants of a manor having gardens, parcel of their customary tenements, to dig and carry away from a waste within the manor for repairing grass-plots in their said gardens for improvement thereof, was held to be bad, as being indefinite and destructive of the common; and so was held to be bad a similar custom to take and apply such turf for making and repairing banks and mounds in and for the hedges and fences of such tenements. The other pleas demurred to allege the right by way of prescription; but they allege the right to be in the inhabitants, and that is also bad, for a prescription supposes a grant, and inhabitants cannot as such take by way of grant where the grant is not from the Crown, and does not, therefore, operate as an in-

corporation of the inhabitants. In *Lockwood v. Wood*, 6 Q. B. 31, 13 L. J. Q. B. 365, the Exchequer Chamber held, that an exemption from stallage for the inhabitants of a town can only be claimed by way of custom, and not by grant or prescription; and TINDAL, C. J., in delivering judgment said, "That under the grant in question, a modern grant not made by the Crown, but by a subject, inhabitants cannot take by that name or description such an easement as that which is now under consideration, that is, a right to place their stalls on market-days *in alieno solo* without making any payment for the same."—He also referred to *Dyce v. Lady James Hay*, 1 Macq. 305.

Milward (R. E. Turner with him), *contrà*. The plaintiff in this case appears to have been lord seignior, the *locus in quo* being alleged to be within the seignior; the plaintiff would, therefore, have had legal rights, and might, therefore, have granted this right to take the gravel to the inhabitants. There is, however, no decision against the existence of such a custom. The question arose before the MASTER OF THE ROLLS, in *Clowes v. Beck*, 13 Beav. 347, 20 L. J. Ch. 505, but that learned Judge refused to decide it, and referred it to a Court of law. The question was also raised in *Johnson v. Wyard*, where a custom was pleaded for the inhabitants of a parish to dig gravel from the soil of another for the repair of the highways, but the cause was there settled without any decision as to the validity of such custom. A similar custom was pleaded in *Orenden v. Palmer*, 2 B. & Ad. 236, and no objection was taken to such plea.

[ERLE, C. J. The defendant was unable in that case to prove the plea when the witnesses, who were tendered, were excluded on the ground of interest.]

*Bond's Case* is referred to by counsel in *Johnson v. Wyard*, as an authority that a "*custom à prendre rushes à streuer l'esglise est bon.*"

[WILLES, J. That case is rather against you; for it appears, on referring to the report of it (Marsh, 16) that the Court considered that the taking of the rushes was an easement of a small matter; and the reporter adds, by way of note, "I remember the plaintiff's freehold lay near the church, and for that reason the Court might conceive the same to be but an easement." That shows that the decision, even as to so small a matter as rushes, was evidently at the time not thought to be satisfactory.]



In *Blundell v. Catterall*, 5 B. & Ald. 268, reported in 24 R. R., it was held that the public have no common-law right of bathing in the sea, and as incident thereto of crossing the sea-shore for that purpose; but HOLROYD, J., referred to the old authorities on the subject, and amongst others to a case Bro. Abr. tit. "Customs," 46, and in the Year-Book of 8 Edw. IV. c. 18, where to trespass for digging land

the defendant pleaded that it was four acres adjoining the [\* 243] sea, and that all the men of Kent from \* time immemorial have used, when they have fished in the sea, to dig in the land adjoining and pitch stakes for hanging their nets to dry. CHOKE, C. J., of the Common Pleas, is reported to have said, "If I have land adjoining to the sea so that the sea ebbs and flows on my land," &c., "when the sea is ebbcd, then in this land which was flowed before peradventure he may justify his digging, &c., for this land is of no great profit to me;" and HOLROYD, J., says, this "doctrine so laid down by CHOKE, C. J., may be true where there is such a custom." With respect to the cases referred to in support of the demurrer, the case of *The Mayor and Commonalty of Lynn Regis v. Taylor* is a decision in favour of the custom, and the case of *Wilson v. Willes* is very different from the present, as there the custom was very destructive to the soil.

[WILLES, J., referred to *Clayton v. Corby*, 5 Q. B. 415, 14 L. J. Q. B. 364, and *Bailey v. Stevens*, 12 C. B. (N. S.) 91, 31 L. J. C. P. 226.]

In *The Marquis of Salisbury v. Gladstone*, 6 Hurl. & N. 123, 30 L. J. Ex. 3, a custom in a manor for the copyholders of inheritance without licence from the lord to dig and get clay from and out of the copyhold tenements for the purpose of making bricks to be sold by them off the manor, was held to be good in law. The cases of *Peppin v. Shakespear*, 6 T. R. 748; *Wilkinson v. Proud*, 11 M. & W. 33, 12 L. J. Ex. 227, and *Rogers v. Brenton*, 10 Q. B. 26, 17 L. J. Q. B. 34, furnish instances in which a claim of a profit *in alieno solo* may be made. Various instances are to be found of easements which may be claimed by custom, such as to dance or play lawful games in the soil of another, *Abbot v. Weekly*, 1 Lev. 176; and *Fitch v. Rawling*, No. 3, p. 305, ante (2 H. Black. 393, 3 R. R. 425); to turn a plough on another's soil, for a fisherman to mend his nets there, or for a gateway or watercourse, *Pain v. Patrick*, 3 Mod. 289 and 294; so to take water from a well in another's land. *Race v. Ward*, 4 El. & B. 702, 24 L. J. Q. B. 153.

[WILLES, J. There the right was held to be not a *profit à prendre*.]

Still it was held that the custom could be well laid to be in the inhabitants of a township. Rights more destructive to the soil than what is claimed by the defendant in the present case have been held to have been properly claimed by custom, *Tyson v. Smith*, 6 Ad. & E. 745, 6 L. J. (N. S.) K. B. 189; and in error, 9 Ad. & E. 406 (No. 5, p. 361, *ante*), and *Elwood v. Bullock*, 6 Q. B. 383, 13 L. J. Q. B. 330. The case of *Blewitt v. Tregonning*, which has been relied on in support of the plaintiff's case, is very distinguishable, as the claim there was for a private advantage, whereas here the custom pleaded is to take the gravel, &c. for the repairs of the highways, and is therefore for a public benefit.

Kemplay was not heard in reply.

ERLE, C. J. The plaintiff has brought an action of trespass for breaking and entering his land and taking thereout gravel and other materials, and the defendant has pleaded in justification several pleas, in some of which is pleaded a custom for the inhabitants of an adjoining township to take the gravel for the purpose of repairing the highways in the said township, and in some the same inhabitants prescribe for such right, whilst in others the custom is alleged to be existing in the parish officers. Now, so far as the defendant has justified under a custom, it is clear that the custom is void, and the justification therefore bad. The practice of taking gravel out of another person's land for the purpose of repairing the highway cannot be made valid as a custom at common law, because it is a *profit à prendre*. That is the general doctrine with reference to custom which is to be found in the passage which has been cited from 1 Wms. Saund., and which was recognized by the Court of Exchequer Chamber in *Lockwood v. Wood*. The authorities which have been referred to, on the other side, have failed to prove such right by way of custom. In *Clowes v. Beck*, the MASTER OF THE ROLLS declined giving any judgment, on \* that point. [\* 244] It is true that ALDERSON, B., in *Padwick v. Knight*, suggested pleading such a custom, but it was only a suggestion, and was no decision. In *Johnson v. Wyard*, the parties agreed to settle the cause, and there was no judgment; and in *Oxenden v. Palmer*, the existence of the custom was denied, and the jury found that in fact there was no such custom, and therefore the Court gave no judgment on the validity of the plea. The result

is, that there is not a shadow of authority in favour of any such custom being pleaded. Then, as to prescribing for any such right, the answer is, that the claim to the right is made on behalf of persons who are incapable of taking a grant; they are not a corporation, neither do they claim the right in the *que* estate, and so bring themselves within the class of cases in which it has been held the right can be prescribed for. Our judgment, therefore, must be for the plaintiff.

WILLES, J. I am of the same opinion. In so far as the right is claimed by custom it is clearly bad. The distinction between claiming an easement by custom and by prescription is now well established. One cannot claim by custom a *profit à prendre* out of another person's soil; and the only difficulty which now exists in any such cases is the difficulty of ascertaining what is a *profit à prendre*. All the authorities in which the easement may be considered as such *profit à prendre*, and in which the claim to it has been held to be good by custom, must now be considered as overruled. No case has actually decided that a custom to take a profit out of the land of another person is good, and the only case which approximates to such a decision is *Bond's Case*, and that case was doubted by the reporter at the time, who gives the only reason by which it can be supported, namely, that the plaintiff's land was so near that a right of easement over it for the purpose claimed might be supposed to exist. In the present case, it is clear there can be no such right as alleged, by custom. Then the other pleas, which allege the right by way of prescription, also fail; for one must prescribe to the right as being annexed to land or enjoyed in gross, either by a body capable of continuing, as in the case of a corporation, or else by a person claiming by descent. Nothing like that is attempted by these pleas. The prescriptive right is not claimed for a corporation, or persons taking by succession, but only for a fluctuating body of inhabitants. The prescription pleaded is a grant to that body, but not so as to have the effect of incorporating them. It is clear that such a right cannot exist, and in support of this I have only to refer to the case of *Bailey v. Steccus*, where it is shown why a claim of that description is bad. I do not say that the claim in these pleas by prescription is not open to other objections, but it is unnecessary to do so, because it is so clearly bad for the reasons already given.

BYLES, J. I also am of opinion that our judgment must be for

the plaintiff. It is clear, only looking at the pleas, that the claim is to a *profit à prendre*. The right is not claimed by a corporation or in the *que* estate, and therefore the defendant is obliged to rely on the pleas claiming the right by custom, which reduces the question to a narrow point, namely, can a custom exist to take away the soil from the land of another person? Now, ever since *Gateward's Case*, it has been held that it cannot; and the present defence is, in fact, an attempt to disturb what has been a settled matter for centuries.

KEATING, J. Whether the right be claimed by custom or prescription, I think that these pleas are equally bad.

*Judgment for the plaintiff.*

#### ENGLISH NOTES.

"It is an elementary rule of law that a *profit à prendre* in another's soil cannot be claimed by custom, for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of people, like the inhabitants of a parish or other district, who could not release the right," *per* BYLES, J. (citing *Gateward's Case*, 6 Co. Rep. 59 *b*, No. 14 of Easements, *post*) in *Attorney-General v. Mathias* (1858), 4 K. & J. 579, 27 L. J. Ch. 761.

Water as it issues from a spring is not considered as produce of the soil so as to make the right to take it from the land of another for domestic purposes a *profit à prendre*. Such right is an easement only, and may be claimed by custom for all the inhabitants of a township within which the spring is situated. *Ruce v. Ward* (1855), 4 El. & Bl. 702, 24 L. J. Q. B. 153. Lord CAMPBELL, C. J., observed (4 El. & Bl. p. 705) that the reason why a *profit à prendre* cannot be supported by a custom in an indefinite number of people is that the subject of the *profit à prendre* would, in that case, be liable to be entirely destroyed. The reasons of the judgment of the Court delivered by Lord CAMPBELL, C. J., are summed up as follows (4 El. & Bl. p. 713): "As to customary rights claimed by reason of inhabitancy the distinction has always been between a mere easement and *profit à prendre*. A custom for all the inhabitants of a 'Ville' to dance on a particular close at all times of the year, at their free will, for their recreation, has been held good, this being a mere easement, *Abbot v. Weekly*, (1 Lev. 176); and we held last term (*Blund v. Lipscombe*, 14 Nov. 1854, 4 El. & Bl. 713 *n*.) that, to a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the inhabitants of the parish to angle and catch fish in the *locus in quo*, was bad as this



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was *profit à prendre*, and might lead to the destruction of the subject-matter to which the alleged custom applied.”

The decision in *Race v. Ward* was followed by Mr. Justice DENMAN in *Bower v. Sandford* (7 June, 1888), 5 Times Rep. 570, which was an action for an injunction to restrain the defendants from diverting the water from a certain spring. Some of the plaintiffs claimed upon several rights appurtenant to their tenements; and one plaintiff claimed on behalf of himself and the other inhabitants of the village in which the spring as well as the various tenements above mentioned were situated. The evidence was complicated by a question whether the diversion abstracted the water from a well defined channel. It was however found by the arbitrator that the operations of the defendant had tapped the water at certain points where it had collected in a defined underground channel before reaching the orifice of the spring. The evidence of user by the inhabitants of the village was clearly deduced for the period of forty years. Mr. Justice DENMAN decided that the flow of the water interfered with was in a defined channel within the meaning of the decision of *Chasemore v. Richards*, No. 16 of “Action” (Right of) 1 R. C. 729 (7 H. L. C. 349, 29 L. J. Ex. 81); and he decided, in effect, that the claim on the part of all the plaintiffs was good. And although it did not appear that the loss of water had yet become a serious injury to any of the defendants, the right and the invasion of it having been made out, the plaintiffs were entitled to their action, on the principle of *Harrop v. Hirst*, No. 3 of “Action” (Right of), 1 R. C. 547 (L. R., 4 Ex. 43, 38 L. J. Ex. 1), and consequently to an injunction.

It seems not out of place to note here a statutory right which has been of great public service in Devon and Cornwall.

By the Act 7 Jac. I. c. 18 (made perpetual by 3 Car. I. c. 4, and 16 Car. I. c. 4), after a preamble reciting that the sea-sand has been found very profitable for the bettering of land, and especially for the increase of corn and tillage within the counties of Devon and Cornwall, and that the landowners adjoining the sea-coasts have of late interfered with persons fetching away the sand as they have been used to do, it is enacted “That it shall and may be lawful to and for all persons whatsoever, resident and dwelling within the said counties of Devon and Cornwall, to fetch and take sea-sand at all places under the full sea-mark, where the same is or shall be cast by the sea, for the bettering of their land, and for the increase of corn and tillage, at their wills and pleasures.” And further that carriers of the sea-sand may fetch and carry the same “by such ways as now be and by the space of 20 years last past have been used for the carrying and fetching thereof,” paying only such duties as have been usually paid by the said space of 20 years.

## No. 6. — Constable v. Nicholson. — Notes.

This statute has been found useful for preserving, in these counties, an access to the sea-shore by convenient ways, which the adjacent owners or tenants have attempted to close.

## AMERICAN NOTES.

A custom to occupy or take anything from the land of another cannot be supported by custom. So it was held in *Winder v. Blake*, 4 Jones Law (Nor. Car.), 332, in respect to fishing, the Court observing: "If the owner of land unreasonably refuses to allow his neighbours to fish in his mill-pond, or to gather strawberries in his old field, the only correction is to arraign him at the bar of public opinion for the violation of the rules of good neighbourship." The contrary however was held in *Marsh v. Colby*, 39 Michigan, 626; 33 Am. Rep. 439; on the grounds of custom and a failure to prohibit. (Mr. Lawson regards the last case as "unsatisfactory." Usages and Customs, sect. 175.)

In *Waters v. Lilley*, 4 Pickering (Mass.), 145; 16 Am. Dec. 333, it was held that a custom to fish in an unnavigable stream was invalid. Citing *Grimstead v. Marlowe*, 4 T. R. 718; 2 R. R. 512. This is also the holding in *Cobb v. Davenport*, 32 New Jersey Law, 369; 97 Am. Dec. 718. Distinguishing a case of prescription, the Court said: "But where the right claimed is a mere *profit à prendre*, as hunting, hawking, or fishing, it is difficult to bring it within those rules, and especially so where the right claimed is of hunting over wild lands, or fishing in secluded waters, when the owner does not himself use the game or fish for a pecuniary profit, but suffers the public in general to hunt or fish without interference. To hold that a right of hunting over another's wild lands, or even over lands under cultivation, was established by showing that the person claiming the right, and those under whom he claims, had at pleasure hunted for game on the premises for twenty years, would be monstrous. Such acts of hunting would be considered to be merely permissive, unless there was clear evidence that they were done under a claim of right, and that the owner knew of such claim, and knowing it, acquiesced in it." A similar decision was made in respect of piling wood on another's land, in *Littlefield v. Maxwell*, 31 Maine, 134; 50 Am. Dec. 653. In *Kenyon v. Nichols*, 1 Rhode Island, 106, and in *Hill v. Lord*, 48 Maine, 83, custom was adjudged insufficient to justify taking of seaweed cast up on the land of another. Citing *Grimstead v. Marlowe*, *supra*; and in *Codman v. Evans*, 5 Allen (Mass.), 308, to justify erecting a bay window projecting over another's land. See *Baylor v. Decker*, 133 Pennsylvania State, 168.

In *Smith v. Floyd* 18 Barbour (New York Supreme Court), 522, it was held that a custom of all the inhabitants of a town to depasture the unenclosed wood lands of particular proprietors was invalid. This was founded on *Pearsall v. Post*, 20 Wendell, 111; 22 *ibid.* 425, which was the case of a custom to use a ferry landing. The same was held in *Mcwin v. Wheeler*, 41 Connecticut, 14, as to taking sand from a beach; and so, in *Perley v. Langley*, 7 New Hampshire, 233, as to taking sand from the land of another. In this case the Court observed: "A distinction has been taken, in all the authorities, betwixt a profit taken from the soil of another, and a mere easement upon

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the soil. Rights *à prendre*. — as the right to taking the herbage of the soil by cattle, a right to take away turf, peat, coal, sand, or gravel, — cannot be alleged as in the inhabitants of a town, and as a local custom. Such a claim must be sustained as a prescription by the individual through his ancestors, or in the name of a corporation and its predecessors, or as appurtenant to some estate holden by the claimant. A mere residence is insufficient. It is not essential that such rights be prescribed for in a *que estate* as holden in the language of 4 Term Rep. 717, for all rights that can be sustained by prescription can be prescribed for in a man and his ancestors; and rights in gross can be prescribed for only in this manner, and cannot be claimed in a *que estate*. 1 Lit., sec. 183; 1 Saund. 346. The inhabitants of a town, as such, or the inhabitants of the ancient houses of a town, cannot claim a right of common, or other profit, *in alieno solo*, for the inhabitants may not have the inheritance. Co. Lit. 113, b; *Gateward's case*, 6 Co. 60; 2 Cor. 152; 2 id. 446; Com. Dig., *Prescription*, H.; Co. Lit., sec. 183, 120, b; *Mellon v. Spateman*, 1 Saund. 346; *Grimstead v. Marlowe*, *supra*; *Waters v. Lilley*, 4 Pick. 145.

“Inhabitants may prescribe for an *easement in alieno solo*: as for a way, for liberty to play at rural sports, to draw nets on another's land, to pass free of toll, for a public landing place, &c. Bacon's Abrid., *Custom*, C; Cro. Eliz. 180; Cro. Ca. 419; 13 Pedersdorf's Abr., note, 502; *Fitch v. Rawling*, No. 3, p. 305, *ante*, 2 Hen. Bl. 393; *Millechamp v. Johnson*, Willes, 205; *Coolidge v. Learned*, 8 Pick. 503; *Sargent v. Ballard*, 9 Pick. 251. But there are no authorities that sustain the removal of the soil, or the taking of profits from the soil of another, as a custom.”

In *Hull v. Lord*, *supra*, the Court, citing *Grimstead v. Marlowe*, 4 T. R. 717, and earlier cases, observed: “The distinction was there made, and has since been recognized, that though custom may support a claim for an *easement*, nothing less than prescription can sustain a claim for a *profit à prendre in alieno solo*. The owner of the fee can be divested of it only by a grant from himself, or by such enjoyment in another as raises a presumption of a previous grant.”

Right of fishery in private waters may be acquired by prescription. *Melvin v. Whiting*, 10 Pickering (Mass.), 295; 20 Am. Dec. 524; *Turner v. Hebron*, 61 Connecticut, 175; 14 Lawyers' Rep. Annotated, 386. But see a query, *Tinicum Fish Co. v. Carter*, 61 Pennsylvania State, 21; 100 Am. Dec. 597. In *Marsh v. Colby*, 39 Michigan, 626, it was held that custom would justify the public in taking fish from a small lake nearly surrounded by one's land, in the absence of prohibition by the owner.

The principal case is cited in Washburn on Easements, marg. p. 76; Lawson on Usages and Customs, p. 331; Gould on Waters, sect. 24.

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No. 7. — *Yates v. Pym*, 6 Taunt. 446. — Rule.

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No. 7. — *YATES v. PYM.*

(C. P. 1816.)

No. 8. — *THE ALHAMBRA.*

(C. A. 1881.)

## RULE.

A CUSTOM or usage of a trade cannot be set up to contradict the terms of an express contract.

***Yates v. Pym.***

6 Taunt. 446-448 (s. c. 16 R. R. 653, and *nom. Yeats v. Pim*, 2 Marsh. 141; Holt. N. P. 95).

*Express Warranty. — Alleged Custom.*

On a warranty of prime singed bacon, evidence is not admissible of a [446] practice in the bacon trade to receive bacon to a certain degree tainted as prime singed bacon.

Nor of a practice to preclude the purchaser from all remedy, if he does not discover and point out the defect by an early day.

This was an action upon a sale note, dated 29th March, to "the plaintiff, of 58 bales of prime singed bacon, at 68s. per cwt., arrived, payable by an acceptance at two months from arrival, average weight if required," brought to recover damages upon the ground that the goods did not answer the character of prime singed bacon. Upon the trial of the cause at Guildhall, at the sittings after Michaelmas term, 1815, before HEATH, J., it was proved that the plaintiff examined as a sample one bale of the bacon on the 31st of March, and three bales on the 3d of April, when the bacon was weighed off, and the plaintiff afterwards gave a bill for the amount. It is usual to inspect bacon by an average, trying three bales in 50, or five bales in 100. If an average is to be taken for taint, it is usual so to express it in the contract. If bacon be prime, a taint in an immaterial part does not prevent it from answering that character, but that does not taint the whole: the bacon in question was too much tainted to be deemed prime. Shepherd, Solicitor-General, offered evidence, that bacon being an article which necessarily deteriorates by keeping, and has even



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from the beginning a nascent taint, so that it cannot by inspection after a considerable interval be known whether it were perfectly sweet when it was first deposited in the warehouse, an usage had been established in the trade, that a certain latitude of deterioration, called average taint, was allowed to subsist, before the bacon ceases to answer the description of prime bacon; and also that if a purchaser does not make his objection within a reasonable time, he is precluded from raising any claim on any defect of quality of the bacon, *HEATH, J.*, held that the contract [\* 447] amounted to a warranty \* that it was primed singed bacon, and being in writing, could not be added to by parol evidence, nor altered by a practice often to dispense with the breach of the warranty; and that although the plaintiff had kept the goods, he might recover in this action. The jury found a verdict for the plaintiff.

The Solicitor-General in this term moved to set aside the verdict and enter a nonsuit, upon the ground that the learned Judge ought to have admitted the evidence.

He could not forego this opportunity of expressing, that no man felt, or ever would feel a stronger reverence than he did, for the opinions and decisions of that learned Judge; he considered it as a debt of gratitude not to omit the occasion of uttering the sentiments not only of himself, but of all his brethren at the bar, to express the unfeigned respect that they felt for the memory of the deceased, not only as a most upright and learned Judge, but as a most good and valuable man; in which sentiment the Court followed him most cordially.

He contended that he set up this custom, not in contradiction to the written contract, but as a term which the peculiar law of the trade engrafted on it, although not expressed; as by the law merchant the three days' grace are added on a bill of exchange, though not expressed on the bill; and as the period of credit prevailing in a particular trade attaches itself on a sale note of those goods, though it express no time of payment, and therefore is, in its ordinary acceptance, a contract for payment on delivery. The purpose of this contract was for taking the case out of the statute of frauds, not for the purpose of excluding all other customs of trade.

*GIBBS, C. J.* All the plaintiff's witnesses say, that if it be prime singed bacon, it cannot be tainted. They also state, that

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when an allowance is made for taint, it is expressed in the contract; but that is not the ground \* on which the [\* 448] defendant's counsel puts it, but that if the buyer does not examine it by a certain day and point out the defect before a certain time, he can never afterwards object, but must take it at the price agreed on, though it be putrid. This can never be: it would lead to great mischief. If a purchaser does not object to the quality in a reasonable time, a strong use may be made of that circumstance, but the use is, that a conclusion arises, that the injury has accrued since the sale; that, however, may be rebutted, and it is gone by, and the defendant has had the benefit of that argument in his address to the jury. I cannot think that any custom of trade can be admissible to prove that proposition now contended for; and my Brother HEATH, for whose opinion we have always felt such a just deference, was right in this, as he was in most other cases that ever came before him.

The rest of the Court concurring, the rule was

*Refused.*

### **The Alhambra.**

50 L. J. P. D. & A. 36-38 (s. c. 6 P. D. 68; 43 L. T. 636; 29 W. R. 655).

#### *Charter-party. — Custom at Port of Discharge.*

When it is agreed by a charter-party that a ship shall proceed to a "safe [36] port, or as near thereunto as she can safely get, and always lay and discharge afloat," the master is not bound, if ordered to a port which can only be entered by first discharging part of the cargo, to allow such an amount to be taken out as will enable her to enter the port, even if the lighterage can be done in a place and under circumstances which will not expose the vessel to danger; and in such a case evidence that the custom of the port is to lighten vessels, when necessary, before entering the port is not admissible.

This was an appeal by the defendants from the decision of Sir R. PHILLIMORE in favour of the plaintiffs, reported 49 L. J. P. D. & A. 73.

The action was brought by the consignees of cargo against the shipowner to recover damages for breach of contract.

Butt and Clarkson, for the defendants.

Milward and Aspinall, for the plaintiffs.

The arguments were in substance the same as in the Court below.

JAMES, L. J. I am of opinion that the question in this case depends really upon the construction of the words used in the

charter-party. The consignees of the cargo had a right to order the ship to proceed to any safe port and deliver there, or as near thereto as the ship could safely get, and "always lay and discharge afloat." Upon the construction of the charter-party, independent of the evidence that the experts gave as to what is meant by a safe port, I am of opinion that the plain meaning of the expression a "safe" port is a port in which the condition of safety was to be got which is referred to afterwards; that is to say, a port into which she could "safely get, and always lay and discharge afloat." That is the place to which she had contracted to go. She had not contracted to go somewhere something like it, or with a little variation from it, as the party ordering her to go might require. The master says, "No, you must name me a port, and I will go to that port if I can get there; and if from any cause not my own fault I cannot get there, I will get as near thereto as I can safely get, still complying with the conditions given me at first, — that is to say, to go to a port where I can safely get and lay and discharge afloat." Then the question is, whether Lowestoft is a port of that kind. Now it is conceded that Lowestoft is not a port in which a ship of the size and burthen of this ship could safely lay — (there is no peculiarity in the ship — she did not differ from any ordinary ship; she was, as far as we can see, an ordinary ship, of ordinary build and ordinary construction) — nor a port in which there is a sufficient draught of water for a ship drawing sixteen feet when she is loaded. It is also admitted that

at low water there was ordinarily not more than eleven [\*37] feet in the harbour. \*In my opinion, therefore, that

is not a safe port. It appears to me that it is not made a safe port — a port in which the ship can lay with safety and discharge afloat — because there is, something outside some little distance from the port, a place in which the ship can lay afloat, and within which place she can discharge part of her cargo; and then when she has discharged a sufficient part of her cargo, she can get into the port which is named. That may be all very well; it may be an unreasonable thing or a reasonable thing, but that is not the bargain the parties have entered into. They never entered into a contract to go somewhere to a port which was not safe, but a port which would be safe if they stopped at some other place near it and with a little manipulation of the cargo made the ship fit to go into that port. That was not the bargain. The bargain was a

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plain bargain, in plain English, that she should go to a port, provided the other party named a port, which in itself and by itself was a port safe for a ship of such a burthen, and complied generally with the other requisites mentioned in the charter-party. I am of opinion, under the circumstances, that Lowestoft was not such a port, and that therefore the defendants are entitled to the judgment of the Court.

BRETT, L. J. The question here is, what was the sort of port to which, when the ship arrived at Falmouth for orders, the charterers or the person representing the charterers would have a right to order the ship to go? It seems to me that the first necessity was that they should order her to go to a port, — to something which is known in seafaring language as a port; secondly, it should be a port in which she might always lay and discharge afloat; and, according to my view, the meaning of that is, that it should be a port in which, from the moment she went into it in the condition in which she was entitled to go into it — from that moment she should be able to lay afloat, and that she should be able to lay afloat until the time when she was fairly discharged. The condition in which she was entitled to go into this port would be “fully loaded,” and she was not bound to unload before she got to that port. Therefore the meaning of it is that it must be a port in which, when she was fully loaded, she would be able to lay afloat; and it must be a port which would remain in such a condition that she would be able to lay afloat from that moment until she was discharged. But there is something more than that. It must not only be that, but it must be safe; therefore, if she was ordered to a port in which she could lay afloat from the beginning to the end, but in which she would not be safe laying afloat (there may be such ports), she was not bound to go to that port. The question is, whether Lowestoft was a port to which, taking that construction, these consignees of the cargo were entitled to order her to go. They ordered her to go to Lowestoft. The meaning of that to my mind, considering what Lowestoft is shown to be, is not to go to Lowestoft roads, but to go to Lowestoft harbour. Therefore the question must be, whether Lowestoft harbour was a place into which she could go fully loaded, and lay afloat from the moment she went into it so fully loaded until she was discharged. In my opinion it was not. But then it is said she could have done that, if she partially unloaded in Lowestoft roads, and



the custom is vouched. It seems to me that that custom is inadmissible, because it is a custom sought to be applied to a contract, where the ship is only bound to go into Lowestoft, as to something to be done before she gets to Lowestoft. The evidence, to my mind, was inadmissible. Therefore it seems clear to me that Lowestoft was a port to which they were not authorised to order her.

The case of *Shield v. Wilkins*, 5 Ex. 304, 19 L. J. Ex. 238, seems to me to be an authority precisely in point as to the principles of this decision. I will say nothing about *Gibson v. Hillstrom*, 3 Asp. Mar. Cas. 302. I reserve my view of how far one is bound to follow that case until the point which was decided in it arises. It does not seem to be applicable to the present case.

COTTON, L. J. I am of the same opinion. What we have to consider is this: whether the charterers had a right to order [\*38] the \*captain of the vessel to proceed to Lowestoft. That depends upon the construction of the charter-party. The place to be named is a safe port within certain limits, and there is this also in the charter-party — although not immediately following — “where the ship can always lay and discharge afloat.” Now, in my opinion, simply taking the construction of this charter (for I think the evidence as to what is meant by a safe port could not be safely admissible — I do not say it could not possibly be — I do not rely on it at all), a safe port there means a safe port for the vessel loading, — that is to say, one into which a vessel loaded can safely get. And in that construction one is supported very much by what was said by Lord CRANWORTH in his judgment in the case of *Shield v. Wilkins*, which is exactly in point, supporting the construction at which I have arrived. But there is something more here. We have in this charter-party a declaratory word “safe;” for though there may be a doubt whether these words, “and always lay and discharge afloat,” apply primarily to the place or to the port of discharge to which the ship can safely get, yet, in my opinion, it does show in this charter-party what is meant by a safe port, — that is, one into which the vessel in its loaded state can safely get, and in which it could “always lay and discharge afloat.” The only question we have to consider is this: whether, on the evidence, Lowestoft was such a place, or whether there was anything as regards the custom which, notwithstanding it was not, can justify the charterers in ordering the ship there.

Whether Lowestoft was such a place must depend upon this, — as to whether the roads were Lowestoft. Now the roads were not the port, — the roads were not a part of the port of Lowestoft; and when the charterers ordered the ship to go to Lowestoft, the charter-party only authorising the ship to go to the port, they must have meant to the port or harbour of Lowestoft, and not to Lowestoft roads. Therefore, in my opinion, though the ship might have safely unloaded whilst laying afloat in the roads, that will not save the charterers, and enable them to say they had a right to require the ship to go to Lowestoft. Now it is said there is a custom of this port, and that that makes a difference. It is perfectly true that when a ship has to go to a port, and there are stipulations as to the time of unloading, the unloading must be according to the custom of the port to which she is bound to go; that is to say, if the custom is in this port that the ship is bound to go to unload part at a particular place, and then go up to the wharf and unload the remainder, that construes and controls, if there is nothing expressly in the contract to the contrary, the stipulations of the charter-party. But it is said here that when the construction of the contract is that the port mentioned is one into which the ship so loaded can safely go, and lay afloat and discharge, that is to be varied by this, that at this particular port ships never do go loaded into port, but stay outside the port and there take out part of their cargo before they go in. But in my opinion that custom, if it is proved, is in no way admissible to control what is the true construction of the charter-party, independently of any such custom proved. When the port is fixed, then the custom of the port may regulate certain things not expressly provided for in the charter-party. In my opinion, the custom of the port as to the way in which ships are dealt with before they go into the port cannot show that the port is one that the charterers had a right under this charter-party to order the ship to go to, if, without any such custom, it would not have been such a port.

JAMES, L. J. I did not say anything about the custom, but I will sum up in a few words my view of it. The custom alleged here is that Lowestoft does not mean Lowestoft, but means something else.

*Appeal accordingly allowed with costs.*

## ENGLISH NOTES.

Questions of how far evidence of usage can be allowed to explain written instruments of contract have already been dealt with in notes under No. 17 of "Agency," 2 R. C. 468 *et seq.*, under No. 15 of "Contract," 6 R. C. 169, 170, and, as to usage to make instruments negotiable, see "Bond" (negotiable), 5 R. C. 197 *et seq.*

The rule is illustrated by *Menzies v. Lightfoot* (1871), L. R., 11 Eq. 459, 40 L. J. Ch. 561, where it was held that an alleged custom in the business of brewers and public house keepers could not alter the priority of mortgages as appearing by the written instruments; see notes to *Hopkinson v. Rolt*, "Assignment," 3 R. C. 553.

In *Abbot v. Bates* (1874), 43 L. J. C. P. 150, 30 L. T. 99, 22 W. R. 488, affirmed (1875) 33 L. T. 491, 24 W. R. 101, the Court refused to give effect to an alleged usage in the business of horse-trainers whereby it was said that the engagement of the trainer "finding unto the said apprentice sufficient meat . . . and all other necessities" did not include clothing and washing. It was not shown that a definite custom existed; still less that the apprentice understood the term in that sense. In the Court of Appeal Lord CAIRNS also put the decision on the ground that the custom, which, as there argued, was to stop the cost of clothing and washing out of wages, would be at variance with the deed.

As between landlord and tenant, a custom that tenants whether by parol or deed shall have the away-going crop after the expiration of the term is good. *Wiglesworth v. Dallison* (1778), 1 Dougl. 201, 1 Smith Lead. Cas., *Griffiths v. Tulerton* (1844), 13 M. & W. 358, 14 L. J. Ex. 83. But the custom may be controlled by the agreement of the parties. *Boraston v. Green* (1812), 16 East, 71, 14 R. R. 297.

In *Tucker v. Linger* (H. L. 1883), 8 App. Cas. 508, 52 L. J. Ch. 941, 49 L. T. 373, 32 W. R. 40, a custom for the tenants to sell for their own benefit flints brought to the surface in ploughing, was held reasonable and good, and not inconsistent with a reservation in the leases of mines and minerals.

The landlord is the person liable to the outgoing tenant, at the expiration of his tenancy, for the seeds, tillage, &c., properly bestowed upon a farm. And although it is the ordinary practice, for convenience, that the incoming tenant should settle with the outgoing tenant for such matters, an alleged custom or usage that the outgoing tenant shall look to the incoming tenant for payment, cannot be supported in law. *Bradburn v. Foley* (1878), 3 C. P. D. 129, 47 L. J. C. P. 331, 38 L. T. 421, 26 W. R. 423.

In *Hayton v. Irwin* (C. A. 1879), 5 C. P. D. 130, 41 L. T. 666, 28

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W. R. 665, by charter-party a ship was to deliver the cargo at H, "or as near thereto as she could safely get." She could not get nearer than S., where the merchant refused to accept the cargo, and set up a custom of the port that he was not bound to take delivery elsewhere than at H. The defence was held bad on demurrer, as setting up a custom inconsistent with the written document. So in *The Nipa* (1892) 1892, P. 411, 62 L. J. P. 12, where by the charter-party, the cargo was "to be brought to and taken from alongside the ship at merchants' risk and expense," evidence of a custom of the port throwing upon the ship-owner the expense of taking the cargo from the ship's rail and landing it on the quay was held not admissible.

## AMERICAN NOTES.

This rule is firmly settled in this country, and is illustrated in some of the cases cited in the last note. The doctrine is explicitly stated in *Barnard v. Kellogg*, 10 Wallace (U. S. Sup. Ct.), 383: "But if it" (the custom) "be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it;" and in *Partridge v. Insurance Co.*, 15 Wallace (U. S. Sup. Ct.), 573.

Of *Yates v. Pym*, Mr. Lawson says (Usages and Customs, sect. 214), it "is in conflict with many later cases as to the admissibility of usage to show the trade meaning of terms in written contract." The same view of it is taken in *Browne on Parol Evidence*, p. 203, where it is laid down that trade usage may be shown to attach a peculiar meaning to words whether they are apparently ambiguous or not. Citing a great number of words and phrases so construed.

But the doctrine of the rule is illustrated by the following cases cited in the last named work: Custom is inadmissible to show that a miller's receipt for wheat "on storage" imported a sale and not a bailment. *Walsworth v. Allcott*, 6 New York, 64; *Marks v. Cass Co., &c. Co.*, 43 Iowa, 146. To show a waiver of a condition by an insurance company. *Odiorne v. N. E., &c. Ins. Co.*, 101 Massachusetts, 551. To show that on a contract to carry a cargo of coal from New York to Portland, the coal to be furnished by the shipper, the agreement may be thrown up by either without liability to damage. *Randall v. Smith*, 63 Maine, 105, 18 Am. Rep. 200. To show that "to arrive by" means "deliverable by" a certain time, on a contract of sale of goods. *Rogers v. Woodruff*, 23 Ohio State, 632. To vary the terms of a contract on which a telegraphic message is sent. *Grinnell v. West. Un. Tel. Co.*, 113 Massachusetts, 299; 18 Am. Rep. 485. To show that "free on board" means subject to inspection fees. *Silberman v. Clark*, 96 New York, 522. To show that on a contract of sale of hogs "to be delivered by giving ten days' notice at any time in June," there was an obligation to deliver in June without notice. *Willmering v. McGaughey*, 30 Iowa, 205; 6 Am. Rep. 673. On a sale of sheep, to show that the wool does not pass. *Groat v. Gile*, 51 New York, 431. To show that "more or less" does not include a variation above five per cent. *Vail v. Rice*, 5 New York, 156. On a contract to sell and ship coal between



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June 11th and Sept. 1st, "at plaintiff's option," to show that notice of the option must be given in season to allow shipment between those dates. *Snelling v. Hall*, 107 Massachusetts, 134. On a contract to deliver "fat, smooth, and merchantable steers, three and four years old, to average twelve hundred pounds gross weight, none to weigh less than one thousand pounds," to attach a peculiar meaning to those words. *Spears v. Ward*, 48 Indiana, 541. To show that to "clear out the field" does not include the removal of the timber. *Harper v. Pound*, 10 Indiana, 32. On a receipt to V. for a note for \$600, "which, if discounted at said bank, \$500 is to be applied to V.'s credit," to show that the note was payable unconditionally. 6 Hammond (Ohio), 246. On a lessee's covenant to leave a mine in good working, to show that the supports and pillars of coal may be removed. *Randolph v. Halden*, 44 Iowa, 327. On a contract for railroad ties, to be inspected and accepted or rejected during distribution on the road-bed, to show acceptance by preliminary inspection and marking. *Smth v. Er's of Ward*, 46 Iowa, 339. To vary the effect of a contract to deliver "in good order." *Polhemus v. Heiman*, 50 California, 438. Where a note is given for a horse, to allow time to try the animal before the sale becomes absolute. *Schenck v. Griffin*, 38 New Jersey Law, 462. To show that "not below A 2" in open policies, refers to rate or register of vessel. *Insurance Cos. v. Wright*, 1 Wallace (U. S. Sup. Ct.), 456. On a sale not mentioning sample, allowing arrival and inspection in bulk, to show the buyer's duty to accept or reject immediately after the receipt and examination of samples. *O'Donohue v. Leggett*, 134 New York, 40. On a contract for hire of a slave, the hirer "to lose the negro's lost time," to show that this did not include loss by death. *Barlow v. Lambert*, 28 Alabama (N. S.), 704. To vary the meaning of "net" in regard to price. *Scott v. Hartley*, 126 Indiana, 239. And to show the meaning of "grain." *Smith v. Clayton*, 29 New Jersey Law, 357. On a breach of warranty of goods, to require prompt examination and return or notification of rejection. *Marshall v. Perry*, 67 Maine, 78. To show employment of whitewood for counters contracted to be of walnut. *Greenstine v. Borchard*, 50 Michigan, 434; 45 Am. Rep. 51. To require margins on an unambiguous sale of flour at a certain price. *Oelricks v. Ford*, 23 Howard (U. S. Sup. Ct.), 49. On a sale of a vessel and agreement to pay all claims against it, to show a limitation to such as were enforceable *in rem*. *Moran v. Prather*, 23 Wallace (U. S. Sup. Ct.), 492. On a contract to "clear, grub, and pile the brush," to dispense with the grubbing. *Holmes v. Stummel*, 15 Illinois, 412. On a printing contract excluding "constructive charges," to justify charges for double measurement. *Detroit Advertiser, &c. v. City of Detroit*, Michigan, to appear. On a sawing contract, the sawyer to retain "one-third of the stuff" for compensation, to retain the slabs also. *George v. Bartlett*, 22 New Hampshire, 496. To show that a common carrier is not an insurer of gold carried under a bill of lading across the Isthmus of Panama. *Simmons v. Law*, 3 Keyes (New York), 217. To explain or limit the meaning of "incompatibility," in a contract of hiring of service. *Gray v. Shepard*, 117 New York, 177.

In *Collender v. Dinsmore*, 55 New York, 200; 14 Am. Rep. 224, it was held inadmissible to show a custom among connecting express companies trans-

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porting goods marked "C. O. D.," to transfer the goods with the bill to the succeeding company and await return of proceeds. The Court said: "Custom and usage is resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. But the incident sought to be imported into the contract must not be inconsistent with its express terms, or any necessary implication from those terms. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract." So in *Dixon v. Dunham*, 14 Illinois, 324, it was said: "No usage or custom can be admitted to vary or control the express terms of a contract; but they may be admitted to determine that which by the contract is left undetermined. The parties by the contract may abrogate any custom, no matter how ancient or uniform, but such custom cannot abrogate the terms of a contract. Whenever there is a conflict the contract must control."

Mr. Lawson fortifies the proposition, "Usages inadmissible when repugnant to express contracts," by fifty pages of illustrations, in fine type.

The doctrine is not inconsistent with the principle that trade usage may be shown to attach a peculiar meaning to words, whether they are apparently ambiguous or not, for such usage is resorted to in order to ascertain what the terms really are in the contemplation of the parties; but when the terms are thus ascertained they may not be contravened by custom.

See generally *Mut. Ass. Soc. v. Scottish Union, &c. Co.*, 84 Virginia, 116; 10 Am. St. Rep. 819; *Hopper v. Sage*, 112 New York, 530; 8 Am. St. Rep. 771; *Pickering v. Weld*, 159 Massachusetts, 522; *Baltimore B. B. Club v. Pickett*, 78 Maryland, 375; 22 Lawyers' Rep. Annotated, 630; 44 Am. St. Rep. 304.

A case somewhat analogous to the second principal case is *Turnbull v. Citizens' Bank*, 4 Woods (U. S. Circ. Ct.), 192. The master in the bill of lading acknowledged that he had received a specified weight of pig iron, and bound himself and the vessel to deliver that weight, "provided it be weighed alongside at discharging." On account of prohibitory wharf regulations the iron could not be unloaded and piled on the wharf, and it had to be hauled across the wharf to the land, where it was weighed and found short. It was held that a custom of the port, construing the word "alongside" as meaning on the earthwork, and not at the side of the ship, was nugatory, because in contravention of an unambiguous contract to weigh "at the end of the ship's tackle." In this case the Court cited *The Delaware*, 14 Wallace (U. S. Supr. Ct.), 579, where it was held that a clean bill of lading imports a contract to stow under deck, and that evidence is inadmissible to show a custom to stow on deck. "It is never admissible to vary or contradict what is plain."

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No. 1. — **Keyse v. Keyse and Maxwell**, 11 P. D. 100. — Rule.

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## DAMAGES.

[See also *Hadley v. Baxendale*, No. 16 of "Carrier," 5 R. C. 502. And see Nos. 47, 48 and 49, and Nos. 58 and 59 of "Contract," and notes, 6 R. C. 540-563, and 617-626. And see *Collen v. Wright*, No. 19 of "Agency," 2 R. C. 484, and notes, p. 495.]

SECTION I. The Nature of Damages.

SECTION II. Measure of Damages.

SECTION III. Province of the Jury in the Assessment of Damages.

### SECTION I. — *The Nature of Damages.*

No. 1. — **KEYSE v. KEYSE.**

(Prob. D. 1886.)

No. 2. — **SEARS v. LYONS.**

(*Nisi Prius*, 1818.)

No. 3. — **EMBLEM v. MYERS.**

(Ex. 1860.)

#### RULE.

GENERALLY, damages are awarded to the injured party by way of compensation for loss, and not to punish the wrong-doer.

But in an action of tort for a malicious injury the jury in assessing damages may consider not only the mere pecuniary damage sustained by the plaintiff, but also the malicious intention, whether for insult or injury, with which the act has been done.

#### **Keyse v. Keyse and Maxwell.**

11 P. D. 100-102 (s. c. 55 L. J. P. 54; 34 W. R. 791).

#### *Divorce. — Damages. — Compensation.*

[106] By Sir James HANNEN (President). In assessing damages against a co-respondent the jury is not to seek to punish him, but is only to give

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No. 1. — **Keyse v. Keyse and Maxwell**, 11 P. D. 100, 101.

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compensation for the loss which the husband has sustained, and is to consider whether this loss has been caused by the action of the co-respondent.

In a case where the wife has not been seduced away from the husband by the co-respondent the jury must take into consideration the conduct of the husband and the protection or assistance which he may have afforded to her after the separation.

The means of the co-respondent are not in any way to be considered as a measure of damages.

This was a petition by the husband praying for a dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent, and damages were claimed.

The parties were married in 1875, and cohabited together until July, 1883, when the respondent left her home. There were five \* children born of the marriage. The petitioner [\* 101] was a licensed victualler carrying on business in Leather Lane, and subsequently in Lower Thames Street, and the co-respondent was a widower with children who was in the habit of frequenting both these houses. The respondent several years after her marriage became irregular in her conduct, neglected her household and children, kept late hours, and ultimately left her home. All trace of her was lost for some time, but she was ultimately found living with the co-respondent to whom she had borne a child.

There was no denial of the adultery, but in mitigation of damages the co-respondent was called, and swore that he had not been criminally intimate with the respondent until September, 1884. The case was heard before the president with a common jury.

Tatlock, for the petitioner.

Middleton, for the co-respondent.

THE PRESIDENT, in summing-up to the jury, said: There is no doubt about the adultery, it has been proved and admitted; and the question therefore that remains for you to consider is what damages, if any, the co-respondent is to pay. Now I am obliged to explain the principle upon which damages are to be given; and, first, you must remember that you are not here to punish at all. Any observations directed to that end are improperly addressed to you. All that the law permits a jury to give is compensation for the loss which the husband has sustained. That is the only guide to the amount of damages to be given. But, undoubtedly, if it is proved that a man has led a happy life with his wife, that she



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 No. 1. — **Keyse v. Keyse and Maxwell, 11 P. D. 101, 102.**


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has taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife away from her husband, then the jury will take those facts into consideration. But the question in this case, as in so many others, is, whether or not these losses have been cast upon the petitioner by the action of the co-respondent. If he did not seduce her away from her husband that makes a very material difference in considering the amount of damages to be given. In considering

these questions undoubtedly the conduct of the husband [\*102] must be looked to. Here the husband and \* wife had been leading an unhappy life before they parted, and he knew she had no means of living. It is for you to judge whether he had really made any effectual efforts to discover where she was — effectual, I mean, in the sense of being such as a man would really take if he had his heart in the inquiry. If you come to the conclusion that he did not make any earnest inquiry after her, that is a fact you could consider when you are considering the question of the damages he has sustained by some man consorting with his wife afterwards. What can any husband expect who has separated from his wife, who he knows has no means? What will follow? Why, that in the ordinary course of things she may yield to the temptation of securing support from some other man. Therefore, take those matters all into your consideration in determining whether or not the petitioner is entitled to damages, and, if so, to what amount.

[In the course of the summing-up a juror asked what were the means of the co-respondent.]

THE PRESIDENT: I am not at all surprised at your asking the question; but that indicates the great misapprehension that exists on this subject. It is not a single case, but it is very often asked. But do you not observe, on the principles that I have explained to you, the means of the co-respondent have nothing to do with the question? The only question is what damage the petitioner has sustained, and the damage he has sustained is the same whether the co-respondent is a rich man or a poor man.

The jury found a verdict for the petitioner, and assessed the damages at £150.

*Decree nisi with costs.*

No. 2. — *Sears v. Lyons*, 2 Starkie, 317-319.**Sears v. Lyons.**

2 Starkie, 317-319 (s. c. 20 R. R. 688).

*Damages. — Exemplary. — Malicious Injury.*

In an action for throwing poisoned barley upon the plaintiff's premises [317] in order to poison his poultry, the jury are not confined in their verdict to the actual damages sustained, but may consider the malicious intention of the defendant.

This was an action of trespass for breaking the plaintiff's close and laying poison upon it, with intent to destroy the plaintiff's poultry.

Evidence was given of the defendant's having strewed poisoned barley, both on the plaintiff's premises and his own, into which it appeared that the \* fowls sometimes escaped; it also [\* 318] appeared that some of the fowls had died in consequence.

Gurney for the defendant, contended that the plaintiff was not entitled to recover greater damages than the value of the fowls, and that the jury could not take into their consideration the malicious intention conceived by the defendant, and expressions which he had made use of with respect to the plaintiff.

ABBOTT, J., in summing up to the jury, cautioned them to guard against the hostile feelings which the evidence they had heard was likely to excite in their minds against the defendant. The action was brought for throwing poisoned barley upon the plaintiff's premises, and destroying his poultry; and it had been proved in evidence, that he had actually committed that injury; and that some of the fowls had died, although, whether from poison thrown on the plaintiff's premises or the defendant's did not appear. It had always been held, that for trespass and entry into the house or lands of the plaintiff, a jury might consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury, and he said, that they were not confined in this case, to the mere damage resulting from throwing poisoned barley on the land of the plaintiff, but might consider also the object with which it was thrown, taking care at the same time to guard their feelings against the \* impression likely to have been [\* 319] made by the defendant's conduct.

*The jury found for the plaintiff. Damages £50.*

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No. 3. — *Emblen v. Myers*, 30 L. J. Ex. 71.

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**Emblen v. Myers.**

30 L. J. Ex. 71-74 (s. c. 6 Hurl. &amp; N. 54; 8 W. R. 665).

*Damages. — Negligence. — Reckless Injury.*

[71] In an action for a wrong, whether arising out of trespass or a negligent act, the jury, in estimating the damages, may take into consideration all the circumstances attending the committal of the wrong.

In an action for wrongfully and injuriously pulling down a building adjoining the plaintiff's stable in a negligent and improper manner, and with such a want of proper care that by reason thereof a piece of timber fell upon the plaintiff's stable and destroyed the roof, and by reason of the defendant's negligence, carelessness, and unskilfulness, part of the building fell upon and injured the plaintiff's horse, evidence was given showing that the defendant had acted wilfully and with the object of forcing the plaintiff to give up possession of the stable. *Held*, that the jury were properly directed that if they thought the defendant had acted with a high hand, wilfully, and with the object of getting the plaintiff out of possession, the damages might be higher than if the injury was the result of pure negligence.

Declaration for that the plaintiff, before and at the time of committing the grievances hereinafter mentioned, was possessed of certain land and a certain stable and loft in the city of London, and then occupied the same, and used it for the purposes of his trade, to wit. of a coal and coke dealer, and the defendant, on the 12th day of April, A. D., 1860, and on divers other days and times afterwards, and before the commencement of this suit, wrongfully and injuriously pulled down a certain other building in the city aforesaid, next adjoining the said land, stable, and loft of the plaintiff, in so negligent and improper a manner, and with such a want of proper and due care and skill in that behalf, that, by reason thereof, a piece of timber fell upon the said stable and loft of the plaintiff, and upon a truck and cart of the plaintiff then standing upon the said land, and used by the plaintiff in his said trade, whereby the said stable and loft were greatly injured, and the gates of the said stable and loft were broken and destroyed, and the roof thereof stripped therefrom, and divers goods and harness of the plaintiff therein exposed, damaged, and destroyed, and the said truck and cart of the plaintiff were broken and spoiled and rendered unfit for use in his said trade; and by reason of the aforesaid negligence, carelessness, and unskilfulness of the defendant a part of the said building so pulled down also fell

No. 3. — *Emblen v. Myers*, 30 L. J. Ex. 71, 72.

upon a certain horse of the plaintiff then upon the said land and used by the plaintiff in his said trade, whereby the said horse was severely injured, and has been and now is rendered unfit for work, and by reason of the premises the plaintiff hath, from thence hitherto, lost and been deprived of the use of his said stable and loft, and of his said cart and truck, and of his said horse, goods, and harness, and has been unable to carry on his said trade, and has lost divers profits therein, to wit, to the amount of £100.

Pleas, not guilty, and a denial of the plaintiff's property, and issue thereon.

The following particulars of the plaintiff's estimated damages were delivered, pursuant to the order of WILDE, B. :—

|   |       |    |    |
|---|-------|----|----|
| The plaintiff estimates his damage to the stables and | £     | s. | d. |
| loft at . . . . .                                     | 20    | 0  | 0  |
| The like to the truck and cart, and the like to cer-  |       |    |    |
| tain goods and harness at . . . . .                   | 15    | 0  | 0  |
| The like to horse at . . . . .                        | 20    | 0  | 0  |
| The like to loss in trade at . . . . .                | 20    | 0  | 0  |
|   | <hr/> |    |    |
|   | £75   | 0  | 0  |

At the trial, before WILDE, B., at the London Sittings in Trinity Term, it appeared that the plaintiff was in possession of a small piece of ground at Houndsditch, which he claimed as his freehold, and on which he had built a stable and loft for the purposes of his trade as a carman and coal and coke dealer. The defendant had recently purchased two old houses adjoining the plaintiff's premises, and employed a labourer to pull them down. In doing this the plaintiff's stable was injured, and a piece of timber falling for the defendant's houses on the plaintiff's stable, knocked part of the roof in, which, falling upon the horse and cart of the plaintiff, injured them. Evidence was also adduced, on the part of the plaintiff, showing that there had been an actual trespass and pulling \* down of part of the stables, and that the [\* 72] defendant was anxious to obtain possession of the land claimed by the plaintiff, and that in consequence of the plaintiff refusing to give it up the defendant was annoyed, and caused the old houses to be taken down in a reckless and hasty manner. Proof was also given that after the writ was served upon the de-



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 No. 3. — *Emblen v. Myers*, 30 L. J. Ex. 72.
 

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defendant he said, "I will pull it all down and stand the racket, — possession I want, and possession I will have." On the other hand, the defendant stated that he had contracted for the taking down of his own houses, and told the person he employed to be careful, and had himself advised the plaintiff to remove his horse out of the way.

The learned Judge, in summing up, told the jury they ought to consider the occasion and the motive, and all the circumstances of the case. If they thought the injury to the stable and the horse arose from the negligent mode in which the defendant's houses were pulled down, and that that was done under the defendant's direction, he was liable; but that there was another view of the case, and if they thought the proceeding was done with a high hand, wilfully, and with the object of getting a poor man out of possession, then the damages might be higher. The jury found a verdict for the plaintiff; damages £75.

Collier had obtained a rule for a new trial on the ground of misdirection, and that the damages were excessive; the alleged misdirection being that the learned Judge told the jury there was a different measure of damages if the injury was the effect of a wilful act instead of being simply the result of carelessness.

B. C. Robinson and Joseph Sharpe showed cause. — The direction was right. If it was sought to exclude the evidence of the trespass, the objection should have been taken at the time. *Doe d. Strickland v. Strickland*, 8 C. B. 724; 19 L. J. C. P. 89. As to the damages, the Court will not interfere. The jury were at liberty to give additional damages for the tort accompanying the wrong declared for. *Sedgwick on Damages*, 478.

Collier and Henry James, in support of the rule. — Motives may be taken into consideration in some cases, as, where poison was thrown on the land; but in the present case the damage could only be the material injury to the building and to the horse: just as in an action for negligent driving the damages must be confined to the amount of injury to the plaintiff's horse or carriage as the case may be.

[WILDE, B. Suppose a servant is driving a carriage, and he pulls up to let another carriage pass, and his master says, "Drive on: I do not care for them," would not the jury be at liberty to give exemplary damages?]

Perhaps in trespass, but not under this form of declaration.

No. 3. — *Emblen v. Myers*, 30 L. J. Ex. 72, 73.

Suppose the defendant desired to pay money into Court, is it to be said he must have calculated the damages by some other criterion than the extent of the damage to the property? The evidence as to the defendant's expressions could not have been objected to, as they would be evidence in any point of view.

[BRAMWELL, B. You did not object to the evidence of the defendant's pulling down the stable.]

They then contended that the damages were excessive.

POLLOCK, C. B. I am of opinion that this rule ought to be discharged; and in expressing my opinion, which, I believe, is the opinion of the whole Court, I certainly consider that the direction of the learned Judge was substantially this, that in measuring these damages the jury might take into consideration the expressions that were used, showing a contempt of the plaintiff's rights and of his convenience, and I entirely agree in the direction. I think it is felt by all persons who have occasion to consider questions of compensation, that there is a difference between that which is purely the result of accident, the party who is responsible being perfectly innocent, and the case where he has accompanied the wrong, be it wilfulness or negligence, with expressions that make the wrong an insult as well as an injury. Not that in this case what are called vindictive damages should have been given, but a different measure of damages might

\* be fairly given, according to the nature of the injury. I [\* 73] must say I go even further. I have read the declaration, and I own it appears to me that this may be put as a wilful wrong; for the complaint is, that the house was wrongfully pulled down, and that in consequence there was this injury. I think that will admit of damages being given against a defendant to an extent beyond what I consider the learned Judge to have invited, by the mode in which he left the case to the jury. Therefore, whether or not the matter be put on the ground that there is really a difference thoroughly recognized in the Courts, and, indeed, out of them, between damages given for an accidental injury, and for an injury where there is malice, I think that in this case the jury had a right, from the language of the declaration, to treat this as an action of trespass, committed wilfully, and with expressions of insult, which were calculated to wound the feelings and give rise to other damages. I do not think that that was the meaning of the learned Judge's summing-up; but had it been, in my opinion it would have been perfectly right on this occasion.

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No. 3. — *Emblen v. Myers*, 30 L. J. Ex. 73.

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BRAMWELL, B. I am of the same opinion. I think my Brother WILDE's direction was perfectly correct. As soon as it is admitted that the plaintiff may recover in an action of tort more than the pecuniary loss he has sustained, it seems to me he is equally so entitled where there is consequential damage, as where he is claiming for a trespass. Suppose a man was to put an offensive mixen on his own lands, opposite his neighbour's window, so as to be a nuisance, and for the mere purpose of annoyance, do you conceive that the damages would be limited to a mere pecuniary compensation? In such a case as that, it may be said the act is wilful. Here the act is wilful, because although the defendant does not say, "I will shower building materials in your yard," he says, in effect, this: "I do not care if that is the result of my operations; nay, I shall be rather pleased, because it will be an annoyance to you." I think the principle is equally applicable in one case as in the other, where consequential damage is claimed in respect of a trespass. Let us take the familiar case of the lawn, and supposing the plaintiff had said, "I claim for your walking over my lawn £500." It might be said, "How can you expect to get damages for that?" He would say, "I claim for that act so much damages by reason of the mode in which it was done." It seems to me, therefore, that the objections which have been taken to the summing-up are unfounded; and with respect to the damages being excessive, I do not understand there is any dissatisfaction on the part of my Brother WILDE with the finding of the jury, nor do I see any reason why there should be.

CHANNELL, B. I thought at first, that upon this declaration the action might be treated as trespass, and not necessarily as an action of negligence. However, upon looking more closely to the declaration, I think that is not the right view of it. We must treat this as an action which charges the defendant with negligence. Treating it as an action of negligence, it remains to be seen whether the summing-up of the learned Judge is open to objection. I think, in substance, the summing-up was this: You may take into consideration all the circumstances of the case; you may take into consideration whether there is enough to satisfy you that the defendant has improperly and unjustly acted in some of the proceedings that he took. You are not called upon strictly to weigh the damages as you have been cautioned to do (that is what it comes to), in a case where mere negligence is established, but you

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may give damages with a liberal and not sparing hand. My Brother BRAMWELL has observed that in an action of trespass, that is, in some actions of tort, you may give evidence of damage beyond the actual injury sustained, in consequence of insulting circumstances connected with the trespass; and I can see no reason why that should be limited to one kind of action of tort, namely, trespass, and should not extend to an action which, in substance, is for negligence committed under circumstances which might have supported an action of trespass. My Brother WILDE says he is not dissatisfied with the amount of damages, and I think there is no ground for disturbing the verdict of the jury.

WILDE, B. I am of the same opinion. I come to the conclusion that, on a \*declaration framed as this is, it [\*74] was competent to the jury to give damages of this character, or at least in this sense. The case appeared to me, at *Nisi Prius*, to be an extremely hard one. It was one in which the defendant acted with a high hand, and evidently with the motive of turning this man out of his possession; and, unless the law precluded the jury from taking that into consideration, in my opinion, on the facts of the case, they were right in doing so. For that very reason I was not dissatisfied with the verdict of the jury. But then it is said, although it might be that it would be so in trespass, it cannot be so in an action brought for negligence. I must say, in the course of the trial, the evidence that was given about pulling down the plaintiff's shed, if that was the view taken of the declaration, ought not to have been admitted, and yet no objection was taken by the counsel for the defendant; he permitted the evidence to be gone into; and a large portion of the trial was occupied with the facts as to the defendant's interference with the plaintiff, and his pulling down the plaintiff's stable and shed; and the case went on to its end on the footing that that was one of the matters to be inquired into. Of course, when I came to sum up the evidence to the jury, and to deal with the question of damage, I dealt with the question of damage as applied to the facts. My attention was not called to the declaration at the time, and it was very natural, when the time for summing up arrived, that I should leave the facts of the case as they had been presented; but assuming the defendant is, notwithstanding he took no such objection, entitled to say, "Looking at the declaration, this is not a matter that could be inquired into by a jury," I am clearly of



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Nos. 1-3. — *Keyse v. Keyse*; *Sears v. Lyons*; *Emblen v. Myers*. — Notes.

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opinion that there is no foundation for the objection. It seems to me impossible, as my Brother BRAMWELL has put it, to say, where a wrong is committed, whether by trespass or negligence, that the mode in which it is committed, and the circumstances attending on its committal, are not to be taken into consideration by the jury, with a view to estimate the damages they think the plaintiff has suffered. I did not leave to the jury that they were entitled to give distinct damages beyond what the plaintiff suffered on account of the defendant's conduct; but I did tell the jury that, in estimating the damage the plaintiff had suffered, they were entitled to take into consideration all the circumstances of the case, the conduct of the defendant, and the expressions used. The Court think that is not an unsound view, and are of opinion that that was not a wrong direction to the jury; and I entirely concur with the view they have taken.

*Rule discharged.*

#### ENGLISH NOTES.

It follows from the principal case of *Keyse v. Keyse*, that if, in spite of the proved adultery of the respondent with the co-respondent, the petition for divorce is dismissed, for instance, on account of the adultery or connivance of the petitioner, the latter is not entitled to any damages. *Manton v. Manton* (1865), 4 S. & T. 159, 34 L. J. P. 121, 11 Jur. n. s. 863; *Storg v. Storg* (1888), 12 P. D. 196, 57 L. J. P. 15, 57 L. T. 536, 36 W. R. 190. This case was approved in *Bernstein v. Bernstein* (C. A. 1893), 1893, P. 292, 63 L. J. P. 3, 69 L. T. 513. There, a husband, after presenting a petition for divorce on the ground of his wife's adultery with A., condoned the offence and allowed the petition to be dismissed. Afterwards he filed another petition for divorce on the ground of his wife's adultery with B., and was permitted to amend the petition by adding to it the charges against A., by inserting a claim of damages against him, and by joining him as a co-respondent. The PRESIDENT, Mr. Justice JEUNE, following *Pomero v. Pomero* (1886), 10 P. D. 174, 54 L. J. P. 93, 34 W. R. 124, ruled that the previous condonation was no bar to a claim for damages. This decision was reversed by the Court of Appeal, and *Pomero v. Pomero* overruled.

In a petition by the husband for dissolution of the marriage on the ground of adultery, the respondent filed no answer, and did not appear. The jury found a verdict against the co-respondent with damages £50. The Court being dissatisfied with the evidence against the wife, directed her to be summoned. She gave evidence to the effect that she had been forced, and was cross-examined. The Court decided that the charge of

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adultery had not been established against her, and dismissed the petition as against her, but gave judgment against the co-respondent for the damages with costs. *Long v. Long* (1890), 15 P. D. 218, 60 L. J. P. 27.

In *Izard v. Izard* (1889), 14 P. D. 45, 58 L. J. P. 83, 60 L. T. 399, 37 W. R. 496, on a husband's petition for divorce and damages against the co-respondent, the only acts of adultery satisfactorily proved had not been committed until after the petitioner and respondent were already living apart under the terms of a separation deed, which had been brought about solely on account of the respondent's intimacy with the co-respondent. It was held that the petitioner was entitled to the same amount of damages as he would have been in absence of a separation deed.

The latter part of the head-note in the first principal case, that the means of the co-respondent are immaterial in assessing damages, was again affirmed in *Bikker v. Bikker* (1893), 67 L. T. 721. But *semble*, the jury may take the co-respondent's wealth into consideration if he used it as a means of seducing the wife. *Cowing v. Cowing* (1864), 33 L. J. P. 149.

In assessing damages against the co-respondent the jury are to take into consideration the same circumstances as would have been considered by a jury in an action for criminal conversation. *Comyn v. Comyn* (1863), 32 L. J. P. 210.

It may be mentioned here, that though the measure of damages is the loss to the husband, its disposition is at the discretion of the Court. It may be settled as the Court thinks proper. *Clark v. Clark* (1863), 2 S. & T. 520, 31 L. J. P. 61, 6 L. T. 639, 10 W. R. 810; *Spedding v. Spedding* (1863), 32 L. J. P. 31; *Narracott v. Narracott* (1864), 3 S. & T. 408, 33 L. J. P. 132, 10 L. T. 389, 12 W. R. 1064; *Forster v. Forster* (1865), 3 S. & T. 158, 34 L. J. P. 188, 9 L. T. 150; *Billingsay v. Billingsay* (1866), 35 L. J. P. 84; *Evans v. Evans* (1866), L. R., 1 P. & D. 36; *Taylor v. Taylor* (1870), 39 L. J. P. 23, 22 L. T. 140; *Ravenscroft v. Ravenscroft* (1872), L. R., 2 P. & D. 376, 41 L. J. P. 28; *Meyern v. Meyern* (1878), 2 P. D. 254, 46 L. J. P. 5, 35 L. T. 909, 25 W. R. 115.

The rule in the principal cases of *Sears v. Lyons* and *Emblen v. Myers* was laid down in the last century in *Wilkes v. Wood*, 19 Howard St. Tr. 1153, at p. 1167, by the Chief Justice PRATT, who said: "A jury have power to give damages for more than the injury received."

In *Merest v. Harrey* (1814), 5 Taunt. 442, 15 R. R. 548, the plaintiff was shooting in one of his fields when the defendant, a banker, magistrate, and Member of Parliament, asked to join the plaintiff's party. The plaintiff declined the honour, and gave him notice not to sport on the plaintiff's land. The defendant swore that he would shoot, fired several

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shots at the birds on the plaintiff's land, and used very intemperate language, threatening in his capacity as a magistrate to commit the plaintiff, and defying him to bring an action. The jury assessed the damages at £500. On a motion for a new trial on the ground of excessive damages, it was held that under the circumstances of the case the damages were not excessive. GIBBS, C. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain." HEATH, J., said: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the Court refused a new trial."

In *Pearson v. LeMaitre* (1843), 5 Man. & Gr. 700, 6 Scott N.R. 607, 12 L. J. Q. B. 253, 7 Jur. 748, it was held that in an action for defamation the plaintiff may, with a view to the damages, give evidence to prove actual malice. *Warwick v. Foulkes* (1844), 12 M. & W. 507, 1 D. & L. 638, 13 L. J. Ex. 109, 8 Jur. 85, was an action of trespass for false imprisonment. The defendant pleaded by way of justification that the plaintiff had committed a felony. This plea was abandoned at the trial. It was held that it was no misdirection to tell the jury that the putting of such a plea on record was a persisting in the charge contained therein, and was to be taken into account by them in assessing damages.

"In actions for malicious injuries, juries have been allowed to give what are called vindictive damages." *Per* POLLOCK, C. B., in *Doe v. Filliter* (1844), 13 M. & W. 47 at p. 51.

In *Gregory v. Sloriman* (1853), 1 El. & Bl. 360, 370, and *Duke of Brunswick v. Sloriman* (1849), 8 C. B. 317, 329, it was laid down that exemplary damages can be recovered for outrage committed under forms of law by abuse of the process of the Courts.

The case of *Emblen v. Myers* was followed in *Bell v. Midland Railway Company* (1861), 10 C. B. (n. s.) 287, 30 L. J. C. P. 273, where by a clause in a railway act similar to sect. 76 of the Railway Clauses Consolidation Act of 1845, the owners or occupiers of land adjoining or near the railway were empowered to extend on their own lands, or on lands on the sides thereof belonging to the railway, any collateral or continuous branch from such lands to communicate with the railway, for the purpose of bringing carriages upon or across the same. In 1839 the plaintiff had laid down such a siding or branch line from his coal

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wharf, and the assent of the company had been given to an opening being made into their line, which had been accordingly made, and was situate near the X. station. Until 1857, the plaintiff enjoyed the benefit of such opening, and a considerable trade in coal had in consequence become established at his wharf. In 1857 the company established a wharf of their own at the X. station, and notified to the plaintiff that they would cease to supply engine power for the conveyance of coal to his wharf. Part of the wharf was then let to A., at a minimum rent or royalty of £200 per annum, and a further royalty on all coals above a certain amount brought to the wharf. Another part of the wharf was let to B., on similar terms, and negotiations were proceeding to let the remainder of the wharf to C. on similar terms. The defendant company refused to deliver some trucks to A. in the usual way, and took them to their wharf at X. The trucks were put in a place where A. could not get at them, and the company refused to allow him to bring horses to take them away. So the trucks remained there. A. & B. left the plaintiff's wharf in consequence, and C. broke off the negotiation. The jury found that the acts had been done intentionally by the company. It was held by ERLE, C. J., WILLES, J., and BYLES, J., that the jury might award damages estimating the loss of the minimum rents which the tenants had to pay. WILLES, J., expressed the opinion that, although the action was not in trespass, the jury might on the authority of *Emblen v. Myers* give exemplary damages from the character of the wrong and the way it was done.

In *Berry v. Da Costa* (1866), L. R., 1 C. P. 331, 35 L. J. C. P. 191, 12 Jur. n. s. 588, 14 W. R. 279, it was decided that in estimating the damage for breach of promise to marry, where the defendant had seduced the plaintiff, the jury may take into consideration that the plaintiff's prospect of marriage had become less by reason of such seduction, and may also consider the mortification to her feelings in ceasing to be a respected member of her family.

Lord BLACKBURN, in *Livingstone v. Raryards Coal Company* (1880), 5 App. Cas. 25, at p. 39, said: "I do not think there is any difference of opinion as to its being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get to that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise, — such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There



could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrong-doer — many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong.”

Commission on amount of bail bond in a salvage action is not usually allowed to the defendant as costs of the action, but it may be recovered as damages from a plaintiff where the arrest of the ship is made maliciously or with gross negligence. “*The Collingrove*,” “*The Múmida*” (1886), 10 P. D. 158, 54 L. J. P. 78, 53 L. T. 681, 34 W. R. 156.

In *Præd v. Graham* (C. A. 1890), 24 Q. B. D. 53, 59 L. J. Q. B. 230, 38 W. R. 103, it was decided that in an action to recover damages for a libel, the jury in assessing damages may take into consideration the whole conduct of the defendant from the publication of the libel to the moment of giving their verdict. This case is referred to in the judgment of PALLES, C. B., in the Irish case of *Harris v. Arnott* (1890), 26 L. R., Ir. 55, where the plaintiff had been libelled by a newspaper report, alleged to be grossly negligent, by the omission of the word “not,” in connection with the description “an invincible.” The defendant paid £50 into court with an apology, but the jury found a verdict for £1000. The Court, holding that there was no evidence of malicious intention, set aside the verdict as excessive; although they recognized the principle that the Court in interfering with the discretion of the jury must be satisfied that under the circumstances of the case no reasonable proportion exists between the injury and the amount of damage awarded.

The rule that (in general) damages are awarded by way of compensation for loss, implies that they do not necessarily (except where exemplary on grounds above explained) cover the entire cost of repairing the mischief. So in an action for waste brought by a reversioner against the tenant, the measure of damages is the diminution in the present value of the reversion, and not the cost of restoring the property to its condition before the waste. *Whitham v. Kershaw* (C. A. 1885-86), 16 Q. B. D. 613, 54 L. T. 124, 34 W. R. 340.

In *Rust v. Victoria Graving Dock Company* (1887), 36 Ch. D. 113, 56 L. T. 216, 35 W. R. 673, the plaintiff had, under a building agreement, advanced money to builders for erecting houses on a piece of land. While the houses were in course of erection, they were injured by a flood caused by the negligence of the defendants. A special referee, to whom the assessment of damages was referred, deducted the value of the houses when repaired and completed, less the expense of repairing

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and completing them, from the amount advanced, and awarded the difference to the plaintiff for depreciation of mortgage securities. This was disallowed by the Court, and an inquiry was directed with a view to ascertaining to what extent the flood had made these houses a less sufficient security for the plaintiff's advances than they were before.

A. sold land to B. One of the conditions of sale described a road as made up. The road was only partially made up. In an action for compensation on the ground of misdescription, it was held that the measure of damages was not the cost of making up the road, but the difference in value between the land with the incomplete road and the land with a complete road. *In re Chifferiel*, *Chifferiel v. Watson* (1889), 40 Ch. D. 45, 58 L. J. Ch. 263, 60 L. T. 29, 37 W. R. 120.

#### AMERICAN NOTES.

"In most jurisdictions," says Mr. Sedgwick (1 Damages, sect. 360), "it is settled that exemplary damages, as a warning to other wrong-doers and as a punishment to the defendant, may be recovered in addition to compensatory damages." Citing *Emblen v. Myers* and *Sears v. Lyon*, and the following among other American cases: *Day v. Woodworth*, 13 Howard (U. S. Sup. Ct.), 363; *Dencer, &c. Ry. Co. v. Harris*, 122 United States, 597; *Jefferson County S. Bk. v. Eborn*, 84 Alabama, 529; *Citizens' St. Ry. Co. v. Steen*, 42 Arkansas, 321; *Bundy v. Maginess* (by statute), 76 California, 532; *Dalton v. Beers*, 38 Connecticut, 529; *Merrills v. Tariff M. Co.*, 10 *ibid.* 384; 27 Am. Dec. 682; *Robinson v. Burton*, 5 Harrington (Delaware), 335; *Smith v. Bagwell*, 19 Florida, 117; 45 Am. Rep. 12; *Coleman v. Allen*, 79 Georgia, 637 (by statute); *Harrison v. Ely*, 120 Illinois, 83; *Binford v. Young*, 115 Indiana, 174; *Thill v. Pohlman*, 76 Iowa, 638; *Wheeler, &c. M. Co. v. Boyce*, 36 Kansas, 350; 59 Am. Rep. 571; *Louisville, &c. R. Co. v. Ballard*, 85 Kentucky, 307; *Daly v. Van Benthuyzen*, 3 Louisiana Annual, 69; *Webb v. Gilman*, 80 Maine, 177; *Philadelphia, &c. R. Co. v. Larkin*, 47 Maryland, 155; *Newman v. Stein*, 75 Michigan, 402; *Peck v. Small*, 35 Minnesota, 465; *Vicksburg, &c. R. Co. v. Scanlan*, 63 Mississippi, 413; *Joice v. Branson*, 73 Missouri, 28; *Bohm v. Dunphy*, 1 Montana, 333; *Haines v. Schultz*, 50 New Jersey Law, 481; *Bergmann v. Jones*, 94 New York, 51; *Chellis v. Chapman*, 125 *ibid.* 214; 11 Lawyers' Rep. Annotated, 784; *Lawyer v. Fritcher*, 130 New York, 239; 14 Lawyers' Rep. Annotated, 700; *Johnson v. Allen*, 100 North Carolina, 131; *Mosseller v. Deaver*, 106 *ibid.* 494; 8 Lawyers' Rep. Annotated, 537; *Hayner v. Cowden*, 27 Ohio State, 292; 22 Am. Rep. 303; *Philadelphia T. Co. v. Orban*, 119 Pennsylvania State, 37; *Kenyon v. Cameron*, 17 Rhode Island, 122; *Quinn v. S. C. Ry. Co.*, 29 South Carolina, 381; *Samuels v. Richmond, &c. R. Co.*, 35 *ibid.* 493; 28 Am. St. Rep. 883; *Louisville, &c. R. Co. v. Guinan*, 11 Lea (Tennessee), 98; 47 Am. Rep. 279; *Rea v. Harrington*, 58 Vermont, 181; 56 Am. Rep. 561; *Harman v. Cundiff*, 82 Virginia, 239; *Borland v. Barrett*, 76 Virginia, 128; 44 Am. Rep. 152; *Beck v. Thompson*, 31 West Virginia, 459 (called compensatory); *Spear v. Hiles*, 67 Wisconsin, 350; *Clissold v. Macchell*, 26 Up. Can. Q. B. 422; *Silcer, &c. Tel.*

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*Co.*, 2 R. & G. (Nova Scotia), 17; *Internat. &c. R. Co. v. Telephone & Tel. Co.*, 69 Texas, 277 (called compensatory); *Day v. Holland*, 15 Oregon, 464.

The doctrine has never been recognized in Massachusetts. *Hawes v. Knowles*, 114 Massachusetts, 518; but the "manner and manifest motive" may be shown as tending to prove mental suffering. This is followed in *Greeley, &c. Railway Co. v. Yeager*, 11 Colorado, 345; *Riewe v. McCormick*, 11 Nebraska, 261; *Spokane Truck & D. Co. v. Hoefler*, 2 Washington, 45; 11 Lawyers' Rep. Annotated, 689. This is the present, overruling the old, doctrine of New Hampshire. *Fay v. Parker*, 53 New Hampshire, 342; 16 Am. Rep. 270. In Michigan decisions may be found on this side. *Stilson v. Gibbs*, 53 Michigan, 280; *Wilson v. Bowen*, 64 *ibid.* 133.

"Whenever a tort affecting the person or property of another is committed fraudulently, maliciously, or wantonly, or with such insult, cruelty, oppression, gross negligence, or other aggravating circumstances as to amount to evidence of malice, it is well settled, by an absolutely overwhelming weight of authority, that the injured party may recover, not only actual compensation for his injury, but also vindictive or exemplary damages, to punish the offender and deter others from like offences." Note, 50 Am. Dec. 767. See note, 27 *ibid.* 684.

Mr. Sutherland says (1 Damages, p. 721): "The doctrine that such damages may be allowed for the purpose of example and punishment, in addition to compensation, in certain cases, is held in nearly all the States of the Union, and in England. In some it is followed with reluctance and deprecating acquiescence; in others with emphatic indorsement; while in a few States it is not accepted, or but partially accepted."

It has even been held that exemplary damages may be awarded even when the actual injury is purely nominal. *Alabama, &c. R. Co. v. Sellers*, 93 Alabama, 9; disapproving *Stacy v. Portland Pub. Co.*, 68 Maine, 279; *Hefley v. Baker*, 19 Kansas, 9; *Wilson v. Vaughn*, 23 Federal Reporter, 229. In *Bergmann v. Jones*, 94 New York, 51, it was said that "the falsity of a libel is sufficient proof of malice to uphold exemplary damages," in the discretion of the jury. So a verdict of \$1000 was sustained against a railroad company where a conductor kissed a female passenger against her will. *Croaker v. Chicago, &c. Ry. Co.*, 36 Wisconsin, 657; 17 Am. Rep. 504. But, on the other hand, in *Maxwell v. Kennedy*, 50 Wisconsin, 615, it was held in slander, plaintiff's bad reputation in respect to the crime charged may mitigate punitive as well as compensatory damages. In *Stacy v. Portland Pub. Co.*, *supra*, the holding was that punitive damages are not recoverable for libel where the jury decide that the actual damage is merely nominal. The Court observed: "It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest, society can have none. Such damages are awarded against a defendant for punishment. But if all the individual injury is merely technical and theoretical, what is the punishment to be inflicted for? If a plaintiff, upon all such elements of damage as were open to him, is entitled to recover but nominal damages, shall he be the recipient of penalties awarded

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on account of an injury, or a supposed injury, to others beside himself? If there was enough in the defence to mitigate the damages to the individual, so did it mitigate the damage to the public as well." The same doctrine is found in *Kuhn v. Chicago, &c. R. Co.*, 74 Iowa, 137; *Kennedy v. Woodrow*, 6 Houston (Delaware), 46, 52.

Exemplary damages may be awarded for injuries caused by gross negligence. *Richmond, &c. R. Co. v. Vance*, 93 Alabama, 144; 30 Am. St. Rep. 41; *Pittsburgh, &c. Ry. Co. v. Lyon*, 123 Pennsylvania State, 140; 10 Am. St. Rep. 517; *West v. Western Un. Tel. Co.*, 39 Kansas, 93; 7 Am. St. Rep. 530; *Press Pub. Co. v. McDonald*, 63 Federal Reporter, 239; 26 Lawyers' Rep. Annotated, 531.

It has been held that exemplary damages are proper in an action for assault and battery although no actual malice is shown: as in a quarrel over seats at a hotel table. *Borland v. Barrett*, 76 Virginia, 128. "Whenever the assault is of a grievous or wanton nature, manifesting a wilful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary damages. Whilst therefore the existence of malice may be shown in aggravation of such damages, its absence does not defeat the right to their recovery." Citing 2 Sedgwick on Measure of Damages, 26, 28.

In *Day v. Woodworth*, *supra*, Mr. Justice GRIER observed: "It is a well established principle of the common law, that in actions of trespass, and in all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive, damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common, as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton or malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury; as the degree of punishment to be inflicted must depend on the peculiar circumstances of each case."

So in *Voitz v. Blackmar*, 64 New York, 440, ANDREWS, J., said: "In vindictive actions, as they are sometimes called, such as libel, assault and battery, and false imprisonment, the conduct and motive of the defendant is open to inquiry, with a view to the assessment of damages; and if the defendant, in



committing the wrong complained of, acted recklessly, or wilfully and maliciously, with a design to oppress and injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation, and beyond that, may, as a punishment to the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper. The same rule has been held to apply in the case of a wilful injury to property, and in actions of tort founded upon negligence amounting to misconduct and recklessness."

Exemplary damages have been approved in the following recent cases: *Ross v. Leggett*, 61 Michigan, 445; 1 Am. St. Rep. 608; *Pittsburgh, &c. Ry. Co. v. Lyon*, 123 Pennsylvania State, 140; 10 Am. St. Rep. 517; and note, 521; *Besso v. Southworth*, 71 Texas, 765; 10 Am. St. Rep. 814; *Savannah, &c. Ry. Co. v. Holland*, 82 Georgia, 257; 14 Am. St. Rep. 158; *Goldsmith v. Joy*, 61 Vermont, 488; 15 Am. St. Rep. 923. — "exemplary damages are not recoverable as matter of right, but . . . they are given to stamp the condemnation of the jury upon the acts of the defendant on account of their malicious or oppressive character;" *Missouri P. Ry. Co. v. Richmond*, 73 Texas, 568; 15 Am. St. Rep. 794 (libel by corporation); *Southern Ex. Co. v. Brown*, 67 Mississippi, 260; 19 Am. St. Rep. 306; *Pearson v. Zehr*, 138 Illinois, 48; 32 Am. St. Rep. 113; *Lucas v. Michigan Cent. R. Co.*, 98 Michigan, 1; 39 Am. St. Rep. 517. — "conduct may be so hasty and ill-timed, and so far disregard proper precautions and the rights of others, as to be reckless and oppressive."

The contrary view was taken by Mr. Greenleaf in his celebrated treatise on Evidence, Vol. II, sect. 253, where Mr. Sedgwick's views are strongly and elaborately controverted. Even in New Jersey, where exemplary damages are allowed, the Court said in a recent case that the doctrine is "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine." Consult also the regrets of RYAN, C. J., as to the prevalence of the doctrine, in *Brown v. Swineford*, 44 Wisconsin, 282; 28 Am. Rep. 582.

The chief attack upon the doctrine was made by the Supreme Court of New Hampshire, in *Fay v. Parker*, 53 New Hampshire, 342; 16 Am. Rep. 270, in which FOSTER, J., at the close of an opinion of fifty-five pages, characterizes it as a "pernicious heresy." The Court gave particular attention to *Sears v. Lyons*, and summed up its views as follows: "And yet this case of *Sears v. Lyons* is constantly cited as an authority for vindictive damages, when in fact it is neither more nor less than an authority for giving compensatory damages for an injury to feelings."

In *Murphy v. Hobbs*, 7 Colorado, 541, the Court said, "that it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns, or Rutherford; that it was not recognized in the earlier English cases; that the Supreme Courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan, and Georgia have rejected it in whole or in part; that of late other States have falteringly retained it because committed to do so; that a few years ago it was correctly said, 'at last account the Court of Queen's Bench was still sitting hopelessly involved in the meshes of what

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Mr. Chief Justice QUAIN declared to be utterly inconsistent propositions; and that the rule is comparatively modern, resulting in all probability from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases." To the same purport, *Winkler v. Roeder*, 23 Nebraska, 706; 8 Am. St. Rep. 155.

In some of the Courts that disapprove exemplary or punitive damages, under that appellation, it has still been held that malice or carelessness may enhance the damages, "not because vindictive damages are allowed, but because the actual damage is made greater by its wantonness." *Meagher v. Driscoll*, 99 Massachusetts, 281. Even in New Hampshire, it is said that in such cases, "the true rule . . . is to instruct the jury" to "be more liberal." *Bixby v. Dunlap*, 56 New Hampshire, 456; 22 Am. Rep. 475.

"The object of exemplary, punitive, or vindictive damages is to punish the wrong-doer, and not to compensate the person injured; and therefore where by statute a cause of action for a tort survives the death of a wrong-doer, since the civil law never inflicts vicarious punishment, nothing more than compensatory damages can be awarded against the personal representative of the wrong-doer." *Sheik v. Hobson*, 64 Iowa, 146; *Ripley v. Miller*, 11 Iredell Law (Nor. Car.), 247; *Wright v. Donnell*, 34 Texas, 291; *Hewlett v. George*, 68 Mississippi, 703.

Some Courts deny exemplary or punitive damages in cases involving acts which are punishable criminally, and allow them in others. *Fay v. Parker*, *supra*; *Freese v. Tripp*, 70 Illinois, 496; *Hendrickson v. Kingsbury*, 21 Iowa, 379; *Stowe v. Heywood*, 7 Allen (Mass.), 118; *Stovall v. Smith*, 4 B. Monroe (Kentucky), 378; *Cherry v. McCall*, 23 Georgia, 193; *Butler v. Mercer*, 14 Indiana, 479; *Taber v. Hutson*, 5 Indiana, 322; 61 Am. Dec. 96; *Huber v. Teuber*, 3 MacArthur (District of Columbia), 484; 36 Am. Rep. 110; *Murphy v. Hobbs*, 7 Colorado, 541; 49 Am. Rep. 366; *Austin v. Wilson*, 4 Cushing (Mass.), 273; 50 Am. Dec. 766; *Boyer v. Barr*, 8 Nebraska, 68; 30 Am. Rep. 814. In the last case the Court say: "Whatever views this Court may arrive at on this question, it will be a hopeless task to endeavour to reconcile them either with the adjudicated cases or the conclusions of eminent text-writers of either this country or England, for so far as we have been able to examine them they are pretty evenly divided both in numbers and weight of authority." In *Stewart v. Muldox*, 63 Indiana, 51, 56, the Court observe: "The question of exemplary damages is not settled beyond dispute, even in England. In America the rule in the several States is not uniform, and amongst text-writers the same difficulty exists. The subject, between Greenleaf and Sedgwick, is a standing controversy. Mayne adheres to the English rule, and is rather the advocate of punitive damages; while Field, in a late excellent work, rather doubts the wisdom of the rule. Indeed, the controversy is sometimes one of words between exemplary damages, an example to warn, and punitive damages, inflicting punishment, both of which are often used as convertible terms, instead of a dispute about principles; and it is not surprising that the discussion continues. The doctrine of exemplary or punitive damages rests upon a very uncertain and unstable basis. It is almost equivalent to giving the jury the power to make the law of damages

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 Nos. 1-3. — *Keyse v. Keyse* : *Sears v. Lyons* : *Emblen v. Myers*. — Notes.
 

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in each case: and in a case where the defendant is a commanding, popular, influential person, and the plaintiff of the opposite character, and the local or temporary excitement or prejudice of the time happens to be in favour of the defendant and against the plaintiff, the jury is apt to be reluctant in giving even pecuniary compensation, without adding anything by way of exemplary or punitive damages; while in a case in which the characters of the parties and the circumstances are reversed, the jury will be apt to push their power to an unwarrantable and unconscionable extent, dangerous to justice and the security of settled rights. Besides, a principle that allows an individual to put the money assessed against another individual, as punishment or a warning example, into his private pocket, when he is not entitled to it, whatever public advantages it may have, does not seem to be thoroughly sound."

In *Murphy v. Hobbs*, *supra*, the Court said: "A second criminal prosecution for the same act, after acquittal or conviction and punishment therefor, is something which no English or American lawyer would defend for a moment. But here is an instance where practically a wrong is inflicted."

But the great majority of the Courts make no distinction between criminal torts and others.

Mr. Sutherland says: "The reasoning upon which this double liability to punishment is maintained is not very satisfactory. It is not a cogent answer to the objection that the additional damages imposed for punishment in the civil action go to the injured party. He is not entitled to it if he is otherwise compensated; nor does the fact that this mulct goes to him instead of the State, render its imposition any less a punishment, which is repeated and duplicated, when upon the same principle and for the same public purpose he is fined again in a prosecution in the name of the State." 1 Sutherland on Damages, p. 739. The double liability is maintained in *Carvin v. Walton*, 18 Missouri, 71; *Phillips v. Kelly*, 29 Alabama, 628; *Roberts v. Mason*, 19 Ohio State, 277; *Kimball v. Holmes*, 60 New Hampshire, 163; *Smith v. Bagwell*, 19 Florida, 117; 45 Am. Rep. 12; *Boetcher v. Staples*, 27 Minnesota, 308; 38 Am. Rep. 295; *Brown v. Swineford*, 44 Wisconsin, 282; *Jockers v. Borgman*, 29 Kansas, 109; 44 Am. Rep. 625.

In *Flanagan v. Womack*, 54 Texas, 45, it was held that in an action of assault and battery, evidence of payment of a fine in a criminal prosecution for the same matter is admissible in mitigation of damages, but not in bar of exemplary damages. This was held doubtingly on the ground of *stare decisis*, the Judges considering that as the payment of a fine to the State does not benefit the plaintiff, it should not be allowed to diminish his recovery. So in *Smitherick v. Ward*, 7 Jones Law (Nor. Car.), 64; 75 Am. Dec. 453. But *contra*, *Cook v. Ellis*, 6 Hill (New York), 166; *Edwards v. Leavitt*, 46 Vt. 126; *Hoadley v. Watson*, 45 *ibid.* 289; 12 Am. Rep. 197.

In respect to corporations, there is a conflict of authority on the question whether exemplary damages are permissible for the grossly negligent or wanton acts of servants or agents. Many cases hold them absolutely liable in such damages whenever the servant or agent would be. So it is held in Ohio, Nevada, Maryland, Indiana, Arkansas, Missouri, Mississippi, Colorado,

Nos. 1-3. — *Keyse v. Keyse*; *Sears v. Lyons*; *Emblen v. Myers*. — Notes.

Georgia, South Carolina, Tennessee, Kansas, Kentucky, Maine. In New York, however, in *Cleghorn v. N. Y. &c. R. Co.*, 56 New York, 44; 15 Am. Rep. 375, it was held that such damages are not recoverable against the corporation, even for the gross or culpable *negligence* of the servant or agent, unless accompanied by other gross misconduct, or authorized, or ratified by the principal. The same rule is recently laid down in *Ricketts v. C. & O. R. Co.*, 33 West Virginia, 433; 25 Am. St. Rep. 901. Apparently so in Virginia. *Norfolk & W. R. Co. v. Lipscomb*, 90 Virginia, 137. Similar doctrine is found in the Courts of Wisconsin, New Jersey, Oregon, Pennsylvania, Rhode Island, Louisiana, California, Michigan, Texas. The numerous cases on this point are cited in 5 Am. & Eng. Enc. of Law, p. 23. See also note 28 Am. St. Rep. 876; 25 *ibid.* 907; 35 Am. Dec. 201. The corporation is always liable for such damages in case of authorization, or ratification by continuing the guilty employee in service after knowledge of his wrong act, or of his incompetence or unfitness. *Cleghorn v. N. Y. &c. R. Co.*, *supra*; *Bass v. Chicago, &c. R. Co.*, 42 Wisconsin, 654; *Goddard v. Grand Trunk R. Co.*, 57 Maine, 202; *Perkins v. Missouri, &c. R. Co.*, 55 Missouri, 201; *Norfolk & W. R. Co. v. Anderson*, 90 Virginia, 1. Mr. Freeman says (note, 28 Am. St. Rep. 877) that "a decided majority" of the American Courts hold a corporation absolutely liable for any act of its employee, without regard to authority or ratification. The majority does not seem very decided, for, as nearly as we can determine, the Courts stand fourteen on the one side and twelve (beside the Federal Courts) on the other, with the great States of New York and Pennsylvania in the latter scale. But after all, there are about a score of States to hear from!

This branch of the general subject is very carefully examined by Judge Thompson (41 Central Law Journal, 307), who says: "The other and more advanced view, and that taken by a great majority of the American State Courts, is that a corporation is liable for exemplary damages for such acts, done by its agents or servants, acting within the scope of their employment, as would, if done by an individual acting for himself, render him liable for such damages; that is to say, although the particular act was neither authorized nor ratified."

The rule in the Federal courts is that a corporation is not liable to exemplary damages, except where a natural person would be liable to such damages for a similar act done by his agents or servants; and that a natural person is not generally liable for such damages except where he has commanded the doing of the oppressive act, or subsequently ratified it. Applying this doctrine to the case in judgment, the Court held that a railroad corporation is not liable to exemplary damages for an illegal, wanton, and oppressive arrest of a passenger by a conductor of one of its trains, which action was in no way authorized or ratified by the corporation. *Lake Shore, &c. R. Co. v. Prentice*, 147 United States, 101. Of this decision Judge Thompson observes: "What the Court means by its being ratified by the corporation is not clear. The opinion, which is written by Mr. Justice GRAY, concedes what the Court had previously held, that corporations may be liable to exemplary damages, but qualifies the concession with the *proviso* that 'the criminal intent necessary to warrant the imposition of such damages is brought home to the corpora-



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**No. 4. — Lynch v. Knight, 9 H. L. Cas. 577. — Rule.**


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tion.” And this, Judge Thompson argues, must mean the stockholders, “as there would be no justice in imputing to the stockholders the criminal intent of the directors whom they have elected. The lines of reasoning of this and other like decisions will overthrow the doctrine of exemplary damages entirely when applied to corporations, except when it can be proved that the criminal act was authorized or ratified by the ultimate constituency, the stockholders; and even then it would be difficult to discover any theory of justice upon which the minority of the stockholders are to be fined and their dividends confiscated because of the criminal act or intent of a majority of them. The true theory is that the rule of exemplary damages is a rule, not of logic, but of public safety; that the public know the corporation only through its ministerial agents and servants; that the corporation touches the public only by the hands of these agents and servants; and that consequently, so far as the public rights are concerned, they are to be regarded as the corporation, — precisely as the doctrine of *respondent superior* identifies the principal and his agent for the purpose of protecting third persons.”

**No. 4. — LYNCH v. KNIGHT.**

(1861.)

**No. 5. — ROBERTS v. ROBERTS.**

(1864.)

**RULE.**

WHERE special damage is the gist of the action, as in actions of slander for words not actionable in themselves, the special damage must be laid and proved. Loss of the society of acquaintances does not constitute such special damage, although perhaps the loss of *consortium* of husband or wife may do so.

**James Lynch (Plaintiff in error) v. William Knight and Jane Knight, his wife (Defendants in error).**

9 H. L. Cas. 577-601 (s. c. 8 Jur. s. s. 724; 5 L. T. 291).

*Slander. — Special Damage. — Husband and Wife.*

[577] Where a wife (her husband being joined for conformity as a plaintiff) brought an action to recover damages from A. for slander uttered by him to her husband, imputing to her that she had been almost seduced by B. before her marriage, and that her husband ought not to let B. visit at his house, and the ground of special damage alleged was, that in consequence of the slander,

No. 4. — *Lynch v. Knight*, 9 H. L. Cas. 577-579.

the husband forced her to leave his house and return to her father, whereby she lost the *consortium* of her husband : —

*Held*, that the cause of complaint thus set forth would not sustain the action, for that the alleged ground of special damage did not show (in the conduct of the husband) a natural and reasonable consequence of the slander. *Dub.* Lord WENSLEYDALE.

In this case an action had been brought in the Court of Queen's Bench in Ireland, in the names of Knight and his wife (the former being joined for conformity), to recover damages for slanderous words spoken of the wife. \* The words complained [\* 578] of were alleged to have been uttered to the husband, and were thus set forth in the first paragraph of the plaint: "Jane is a notorious liar, and she will do her best to annoy you, as she takes delight in creating disturbances wherever she goes, and I advise you not to introduce her into society. Any singularity of conduct which you may have observed in your wife must be attributed to a Dr. Casserly of Roscommon, as she was all but seduced by him; and I advise you if Casserly comes to Dublin, not to permit him to enter your place, as he is a libertine and a black-guard; I have no other object in view in telling you about her conduct, and in speaking to you as I have done, but your own welfare. She is an infamous wretch, and I am sorry that you had the misfortune to marry her; and if you had asked my advice on the subject I would have advised you not to marry her."

Innuendo: "That the defendant thereby meant to impute to the plaintiff Jane, that she had been guilty of immoral conduct before her marriage, and that she was a person of immoral and abandoned character and habits, and that she was a person likely to be guilty of committing adultery with said Dr. Casserly, if plaintiff William were to permit him to visit his said wife; and that the defendant also meant thereby that the plaintiff Jane was a person who, from her bad conduct, habits, and character, was likely to bring disgrace on the plaintiff William, and that he ought not to allow her to mix in society, lest she might do some act which would bring disgrace on him as her husband; and that the defendant farther meant thereby that the plaintiff William was to be pitied for having married the plaintiff Jane from her immoral character and abandoned habits, and that he should be on his guard against her bringing him into farther trouble \* and dis- [\* 579] grace by future immoral or improper conduct on her part."

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No. 4. — *Lynch v. Knight*, 9 H. L. Cas. 579, 580.

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The second paragraph set forth the following words :—

“ He threatened to shoot me. I told him of his wife’s misconduct. It was all owing to his wife. She had been insinuating to him that he had seduced her. She is a horrid young villain, and a notorious liar. Her brother, one Thomas Jones, is also a liar, but his lies are of the most harmless kind, whereas hers are of the most dangerous. In fact, she is such a dangerous character to have in the house, that I was obliged to have the back door in the yard nailed up.”

Immuendo: “ That the defendant thereby meant to impute to the plaintiff Jane that she had been guilty of immorality as aforesaid with the said Dr. Casserly, and that for the purpose of trying to conceal her said guilty conduct, she falsely represented to her husband that the defendant himself had tried to seduce her, and had, in fact seduced her; and also that the defendant meant thereby to impute to the plaintiff Jane that she was a woman of the most abandoned habits and character, and that she was capable of inventing any story to suit her own purposes, and that, in fact, it was unsafe for the defendant to have her living in his house from her conduct and character, and that the defendant had, in fact, been obliged to adopt precautions to prevent her having access to a portion of his premises, lest she might commit some crime therein.”

The averment of special damages were in these terms :—

“ And the plaintiffs aver that from the said false, scandalous, and malicious statements of the defendant, the plaintiff William was at first led to believe, and that he did in fact believe, that his wife, the plaintiff Jane, had been guilty of improper and [\*580] immoral conduct before her \* marriage, and that her character and conduct was such as represented as aforesaid by said defendant; that he, the plaintiff William, ought not any longer to live with the plaintiff Jane as his wife; and the plaintiff William, influenced solely by the defendant’s said slander, and then believing that the statements so made by the said defendant, who was the stepbrother of his wife, were true, shortly after speaking of said matter by the defendant, and in consequence thereof, was induced to refuse, and did in fact refuse to live any longer with the plaintiff Jane as his wife, and on the contrary, the plaintiff William required the father of the plaintiff Jane, who lived in the country, to take her home to his own house, which he accord-

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ingly did; and the plaintiff Jane, in fact, thereupon left Dublin and returned to her father's house, where she resided for a considerable time, separated from her said husband. And the plaintiff's aver that such separation was solely and entirely caused by and resulted from the acts of the defendant as aforesaid." And the plaintiff's aver that they have sustained damage.

The defendant demurred to the plaint upon the grounds, that the words not being actionable in themselves, the special damage assigned was too remote; also, that the damage if taken to be damage to the wife alone, was not such a temporal loss as a Court of common law could take cognizance of; also, that the damage complained of having resulted from the wrongful and illegal act of one of the plaintiffs, she could not maintain an action for it; also that in any case, the action being for words spoken of the wife, not actionable in themselves, the plaintiff Jane should not have been joined as plaintiff.

The defendant also, as a defence, denied the uttering of the words, and further pleaded that they were not spoken in the sense imputed.

\* The issues settled by the Court were, first, whether the [\* 581] defendant spoke the words; secondly, whether they were spoken in the defamatory sense mentioned in the two paragraphs of the plaint.

The jury found a verdict for the plaintiffs, damages £150. The Court of Queen's Bench having overruled the demurrer judgment was given for the plaintiffs on this finding. The case was then taken on error to the Exchequer Chamber, where the Judges were divided in opinion, but the judgment was affirmed. The present proceeding in error was then brought.

After argument:—

LORD BROUGHAM: (17 July)

[588]

My Lords, in this case I will read the judgment of my noble and learned friend, the late LORD CHANCELLOR.<sup>1</sup> He says:—

"In addition to hearing the able arguments at the bar in this case, I have had the advantage of reading the judgments *in extenso*, corrected by themselves, of all the learned judges in Ireland who took part in the decision in the Court of Queen's Bench

<sup>1</sup> The LORD CHANCELLOR (LORD CAMPBELL) died on the 23d June, after the hearing of this case, but before the judgment was delivered.



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[\* 589] or in the Court of \* Exchequer Chamber. I may be permitted to observe, that I have been greatly pleased by the research, the learning, and the talent which they display.

“After much consideration, I agree with the two dissenting judges in the Court of Exchequer Chamber. I am far from thinking the opinions of the majority to be entitled to less weight from the difficulty with which they were formed, and the hesitation with which they were pronounced. On the contrary, I regard them on this account still more respectfully.

“Were it not for one defect in the case of the plaintiffs, I should have agreed with them, and I think that all the other objections to the action were properly overruled.

“Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. If the special damage alleged to arise from the speaking of slanderous words, not actionable in themselves, results in pecuniary loss, it is a loss only to the husband; and although it may be the loss of the personal earnings of the wife living separate from her husband, she cannot join in the action. But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognise, to the wife as well as to the husband. The wife is not the servant of the husband, and the action for criminal conversation by the husband does not, like the action by a father for seduction of a daughter, rest on any such fiction as a loss of the services of the wife. The better opinion is that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband who had seduced him. But [\* 590] I conceive \*that this rests on the consideration that, by the adultery of the husband, the wife does not necessarily lose the *consortium* of her husband; for she may, and under certain circumstances, she ought to condone and still enjoy his society; whereas condonation of conjugal infidelity is not permitted to the husband, and, by reason of the injury of the seducer, the *consortium* with the wife is necessarily forever lost to the husband.

“I place no reliance on the objection, that in a case like the present, the imputation cast on the wife being false, the act of the

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husband in separating from her is wrongful, and therefore he cannot join as plaintiff in an action, the foundation of which is his own wrongful act. If his dismissal of the wife from his house would have been reasonably justifiable, had the words spoken been true, and this act was a natural, probable, and direct consequence of the imputation, I do not think that the defendant could avail himself of the objection of the imputation being false, he having intended the husband to believe that it was true, and having intended the husband to act upon it. Mr. Bovill observed, that 'the husband ought to have kicked the slanderer out of his house, and not his innocent wife.' But we cannot hear such language from the mouth of his client, the slanderer.

"From some expressions of Lord ELLENBOROUGH in *Vicars v. Wilcocks*, 8 East 1 (9 R. R. 361), it is argued that such an action will not lie, where the act is wrongful as between the party who does the act and the party to whom it is done. But if there be any error in that case, I think it was in supposing that the offence imputed to the servant, even if he had been guilty of it, would not have justified his master in dismissing him from his service. I do not consider Lord ELLENBOROUGH to have held that, although the \*imputation, if true, would have justified [\* 591] the dismissal, the action would not lie, because the imputation was false, and the dismissal was wrongful.

"I am of opinion that in the present case the action is not maintainable because, looking to the frame of the declaration, the loss or special damage relied upon is not the natural and probable consequence of the injury complained of, viz., the speaking of the slanderous words. It is allowed that the words are not actionable in themselves, and reliance is placed solely on the allegation, 'that in consequence thereof the husband was induced to refuse, and did, in fact, refuse to live any longer with the plaintiff Jane, his wife, and on the contrary thereof the plaintiff William required the father of the plaintiff Jane, who lived in the country, to take her home to his own house, which he accordingly did; and the plaintiff Jane in fact thereupon left Dublin, and returned to her father's house, where she resided for a considerable time separated from her husband.' Now, assuming that this rather inartificial language amounts to a sufficient allegation that in consequence of the words spoken by the defendant, the plaintiff Jane had for a time lost the conjugal society of her husband, we must inquire whether this

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special damage was the natural and probable consequence of the words spoken. Had those words contained a charge of adultery by the wife, which the defendant pretended to know, and which he asserted as a fact, I should have thought the allegation of special damage sufficient to support the action. In that case the husband, believing the charge to be true, would have been justified in separating from his wife, and this separation would have been the natural and direct and probable consequence of the slander.

Although not the necessary consequence, it would not have [\* 592] arisen from any \* idiosyncrasy in this particular husband.

Most husbands would have done the same, and the effect might have been foreseen, and might be taken to have been intended by the defendant when he spoke the words. But, examining the words actually spoken as set out in the plaint, they contain no charge of adultery, nor any imputation of any kind which, if true, would justify the act of the plaintiff William, or would induce any reasonable man to do such an act. The specific charge excludes adultery, and the general charges amount only to levity of manners, requiring vigilance on the part of the husband, and the advice given was consistent with her remaining in the conjugal society of her husband, — that he should keep her at home, and not allow her to mix in society, lest she should thereafter do some act which would bring disgrace on him.

" I think that *Allsop v. Allsop*, 5 Hurl. & N. 534, was well decided, and that mere mental suffering or sickness, supposed to be caused by the speaking of words not actionable in themselves, would not be special damage to support an action. But we need not farther inquire into the soundness of that decision, for in this case there is no allegation of mental anguish or bodily suffering in consequence of the slander.

" Reliance was placed on the action by a young woman for words not actionable in themselves, being supported by the special damage, that her marriage had been broken off by slander, although, the imputation being untrue, the recreant lover could not justify his breach of contract. But there the words must be such, as if true would be a justification to him. The act constituting the special damage must be such as might be expected from a reasonable man who believed the truth of the words according to the intention of the slanderer.

[\* 593] " \* I may lament the unsatisfactory state of our law,

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according to which the imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her; but I am here only to declare the law; and being of opinion that in this case the special damage relied upon arose, not from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the plaintiff William dismissing the plaintiff Jane from his house when he was only cautioned not to let her mix in society, I must, with sincere deference for the authority of the majority of the Irish Judges, advise your Lordships that the judgment be reversed."

My Lords, I entirely agree with my late noble and learned friend, in his observations, which I have read, upon this case, with this exception, that I am rather inclined to think (though that has become immaterial) that the action does not lie. The words here are not such as would in an ordinary case, and with ordinary persons, naturally produce the effect which they appear to have produced in this case. That is the ground upon which I would hold that the judgment of the Court below is wrong. The words did not impute to the wife actual criminality before marriage. My late noble and learned friend seems to have thought that if they had imputed actual criminality before marriage the parties would stand in a different position. I rather doubt that; but, however, it becomes quite unnecessary to decide that because the words did not impute actual criminality, and therefore we need not now consider what would be the effect of words of that kind. Here the words are only that she had shown herself false and deceptive, and that before \* marriage she had [\* 594] been, not seduced, but had been all but seduced, by Dr. Casserly. "All but seduced,"—that excludes the actually having been seduced. I am clearly of opinion that these words in an ordinary case, and with ordinary men, would not have led to the consequence of the wife being turned out of the house, and sent home to her father. I am therefore of opinion that a sufficient ground of action has not been stated, and that the judgment ought to be for the plaintiff in error.

I must add, that I entirely agree with what my late noble and learned friend says towards the end of his judgment. He laments the unsatisfactory state of our law, according to which the imputa-



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tion by words, however gross, on an occasion however public, upon the chastity of a modest matron, or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her. The only difference of opinion which I have with my noble and learned friend is, that instead of the word "unsatisfactory," I should substitute the word "barbarous." I think that such a state of things can only be described as a barbarous state of our law in that respect.

LORD CRANWORTH: My Lords, we have had, since the argument, an opportunity of fully considering the judgment delivered by the learned Judges in the Exchequer Chamber in Ireland. The result in my mind is that which I had previously formed, viz., that the view of the case taken by the minority of those Judges is correct, so that the judgment below ought to be reversed.

In order to sustain the judgment of the Court below, the defendants in error must maintain two propositions: First, that [\* 595] for slanderous words spoken of a wife, not \*actionable in themselves, but occasioning special damage to her by depriving her of the *consortium*, or conjugal society of her husband, the husband and wife may maintain an action against the slanderer; and secondly, that supposing such an action to be maintainable, the words spoken in this case were such as might naturally occasion the wife to lose the *consortium* or society of her husband.

My late deceased and noble and learned friend, the late LORD CHANCELLOR, I know, entertained a strong opinion on the first point in favour of the right of action. He thought that the consequential damage arising to the wife in such a case afforded her a good ground of action; that the right of action on that ground was not confined to the husband.

In the view which I take of this case, I do not feel called on to express a decided opinion on this point. I believe your Lordships are not all agreed on it, and I will therefore only say that I am strongly inclined to think that the view taken by my late noble friend was correct.

But the ground on which I am prepared to advise your Lordships to reverse the judgment below is, that even supposing such an action would lie, still this action is not maintainable.

The special damage, in order to afford a foundation for such an action, must appear to be the natural, I do not say the necessary,

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consequence of the words spoken; and in this case, I cannot come to the conclusion that the conduct pursued by the husband was that which was or which the slanderer could have supposed likely to be, the consequence of his slander. The words uttered do not, it must be observed, impute to the wife actual criminality before marriage, but only that she had shown \* herself [\* 596] false and deceptive, and that before her marriage she had been all but seduced by Dr. Casserly.

I cannot say judiciously that the natural result of such slander would be to induce the husband to send his wife back to her parents, and to refuse any longer to live with her. Such conduct on the part of the husband could not have been justified; he might have been compelled to take back his wife.

If the slander had been that she had been guilty of a breach of her marriage vows, that she had, since her marriage, committed adultery, then, indeed, the conduct of the husband in sending his wife to her friends, and refusing any longer to cohabit with her, would have been the natural result of the words spoken. It would not then lie in the mouth of the slanderer to say that they were false, or that the husband ought not to have acted on them; and supposing such an action to be maintainable at all, the special damage would have been well laid as being the natural consequence of the slander. But in the present case I should have thought that the natural result of the imputations would have been to lead the husband to watch his wife more carefully, to take care that she was never allowed to meet Dr. Casserly, and to attempt, as far as possible, to reclaim her from the habits of deception and falsehood into which she was represented to have fallen before her marriage.

On the ground, therefore, that the plaint or declaration does not state any consequential damage to the wife as flowing naturally from the words spoken, I am of opinion that judgment ought to be given for the plaintiff in error.

\* Lord WENSLEYDALE: My Lords, since the argument [\* 597] at your Lordships' bar, we have been furnished with copies of all the judgments delivered in the Queen's Bench, and in the Court of Error in Ireland, in which the case is argued on both sides with very great ability, and every authority, I believe, bearing on the questions, cited. With the great additional aid derived from these judgments, I have given these questions every

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consideration in my power, and, not without considerable difficulty and doubt, have come to the conclusion that the judgment of the Court of Error ought to be reversed, and judgment given for the plaintiff in error.

The questions in the case are two:—1st, Whether a wife can maintain an action for the loss of the *consortium* of the husband by a wrongful act of the defendant (joining, of course, her husband for conformity)? and 2d, Whether the loss of that *consortium* is sufficiently connected with and shown to be the consequence of the defendant's wrongful act in this case, so as to be actionable?

There is a considerable doubt upon both these questions, but particularly on the first. I have made up my mind that no such action will lie.

To test this, suppose an action brought by the wife for false imprisonment of the husband by the defendant, for a period of time, by which she lost the *consortium* of the husband during that time. Would such action lie? If it would not, *a fortiori*, no action could be maintained for slander attended with the special damage of the loss of the husband's society, caused immediately by his own act.

It is certainly an objection of the greatest weight to [\* 598] \* such an action that there is no precedent or authority of any kind in favour of it.

It is contended that it may be supported by analogy to the action which the husband may unquestionably maintain for an injury to the wife *per quod consortium amittit*.

I agree with Baron FITZGERALD, that the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of the husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with the position in society of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends.

Mental pain or anxiety the law cannot value, and does not

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pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose services is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honour and wounded feelings of the parent.

\* The loss of such service of the wife, the husband, who [\* 599] alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply; and it cannot be presumed that the wrongful act complained of puts an end to the means of that support without an averment to that effect.

And if there were such an averment, the recovery of a compensation must be by joining the husband in the suit, who himself must receive the money, which would not advance the wife's remedy. The wife is, in fact, without redress by any form of action for an injury to her pecuniary interests.

That the loss of the comfort of the society and attention of friends by a wrongful act does not support an action for slander is fully settled by the case of *Moore v. Meagher*, 1 Taunt. (39 9 R. R. 702); and the wife can have no right of action for a loss of the same character, though of a much higher degree, for the loss of that of her husband. To the same effect is the case of *Medhurst v. Balams*, cited in 1 Siderf. 397.

For these reasons, I think the wife has no remedy in the supposed case of the wrongful imprisonment of the husband; and by parity of reasoning she can have none for being deprived of the society of her husband by the slander of another upon her character, causing him to desert her, especially when we consider that the damage in this case is immediately caused by the husband's own voluntary act.

This view of the case makes it unnecessary to consider



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whether the slander of the defendant has been proved to [\* 600] \* be the cause of the loss — the desertion by the husband — so as to make the words actionable, they not being so unless they have caused a special damage. Upon this question I am much influenced by the able reasoning of Mr. Justice CHRISTIAN. I strongly incline to agree with him, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow.

I agree with the learned Judges, that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations, of such a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did.

In the case of *Vicars v. Wilcocks*, 8 East 1 (9 R. R. 361), I must say that the rules laid down by Lord ELLENBOROUGH are too restricted. That which I have taken from Mr. Justice CHRISTIAN seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord ELLENBOROUGH puts as an absurd case, that a plaintiff could recover damages for being thrown into a horsepond, as a consequence of words spoken; but I own I can conceive that when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation [\* 601] \* might be given for an act occurring as a consequence of an accusation of that crime.

I think the judgment of the Court of Exchequer Chamber should be reversed.

*Judgment reversed.*

Lord's Journals, 17th July, 1861.

**Roberts v. Roberts.**

33 L. J. Q. B. 249-251 (s. c. 5 B. & S. 384; 10 Jur. N. S. 1027; 10 L. T. 602; 12 W. R. 909).

*Defamation. — Slander. — Special Damage.* [249]

The special damage necessary to support an action for defamation, when the words spoken are not actionable in themselves, must be the loss of some material temporal advantage.

Where words were spoken imputing unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of a sect of Protestant Dissenters, of which she had been a member, and was prevented from obtaining a certificate without which she could not become a member of any other society of the same nature, — *Held*, that such a result was not such special damage as would render the words actionable.

The declaration alleged, that before and at the time, &c., the plaintiff Margaret was a member of a certain sect of Protestant Dissenters, to wit, Calvinistic Methodists, and was a member of a private society and congregation of the said sect held at Denbigh, in North Wales, and the said sect and the different societies of the said sect are subject to certain rules and regulations, and the different members of the said sect and the said societies are respectively subject to certain rules and regulations, and under the control and authority of the several respective societies, and of the leaders of the same, with respect to the moral and religious conduct of such members, and with respect to their being respectively allowed and permitted to be and continue to be members of the said different societies and congregations of the said sect; and by the said rules and regulations a member of one society in the said sect cannot become a member of another society in the said sect, unless the leaders or elders of the first-mentioned society certify that the said member is morally and otherwise fit to be a member of such sect and of a society of the same; and the defendant, being a member of the said sect and of the same society to which the plaintiff Margaret then belonged, and well knowing the premises, falsely and maliciously spoke and published of the plaintiff Margaret, and of her as a member of such sect and society as aforesaid, in the presence of the leaders or elders and other members of the said society and congregation which the plaintiffs and the defendant had just before then been attending, the false and scandalous words following, in the Welsh language

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(setting them out), which said words being translated into the English language have the meaning and effect following, and were so understood by the persons to whom they were so spoken and published, that is to say, " You " [meaning the plaintiff Robert Roberts] " have got for a wife " [meaning the plaintiff Margaret] " as great a whore as any in the town of Liverpool. I had connexion with her several times; the last time a night or two before she left for Liverpool," — meaning thereby, that the plaintiff Margaret had been guilty of such immoral conduct as would prevent her being allowed and permitted to remain, become, or be a member of any society and congregation of the sect aforesaid, and by means of the premises the plaintiff Margaret was not allowed or permitted to continue or be any longer a member of the said society and congregation aforesaid, and was turned out of the same, and the leaders or elders of the said society refused to certify that the plaintiff Margaret was morally or otherwise fit to be a member of the said sect, or of any society or congregation of the same; and the plaintiff Margaret being desirous of becoming a member of a society and congregation of the said sect in Liverpool, was not allowed or permitted or able to become a member of the said society in Liverpool, and was prevented from attending religious worship; and by means of the premises the plaintiff Margaret became and was greatly injured in her good name and reputation, and became sick and ill and greatly distressed in body and mind: and the plaintiff Robert Roberts says that by means of the premises he has been put to and has incurred great expenses in and about nursing the plaintiff Margaret, and in endeavouring to get her cured from her said sickness, illness, and distress of mind: and the plaintiff Robert Roberts has sustained divers other injuries and damages: and the plaintiff claims £500.

Demurrer and joinder in demurrer.

M'Intyre, in support of the demurrer. — The words are [250] not actionable in themselves: \* and the question is, whether the declaration shows such special damage as will enable the plaintiff to maintain the action. It is clear that the allegation that the plaintiff Margaret became sick and ill is not sufficient. *Allsopp and Wife v. Allsopp*, 5 Hurl. & N. 534; 29 L. J. Ex. 315. Then the only remaining point as to her being excluded from the society to which she belonged, and being prevented from becoming a member of any other society of the

same kind, must be decided in favour of the defendant, as not showing such special damage as will make the words actionable. *Lynch v. Knight*, p. 382, *ante*, 9 H. L. Cas. 577, may be relied on as an authority for the plaintiffs. In that case Lord CAMPBELL, C. J., held that a wife may maintain an action against a third person for words occasioning to her the loss of the *consortium* of her husband; but there it was also held that the words spoken must be such as that the loss of the *consortium* would follow as a natural and reasonable consequence. It shows that there must be some special temporal damage. *Bateman v. Lyall*, 7 C. B. (N. S.) 638, may be relied on; but there there was the loss of custom in consequence of the words spoken by the defendant; and in *Henkle v. Reynolds*, 7 C. B. (N. S.) 114 the words were actionable in themselves.

[BLACKBURN, J. — In the present case, if the words alleged to have been spoken were believed, the exclusion from the society was the most natural result that could happen.]

Would not the natural result have been, that she should have been kept in the society for further education and instruction? But, further, it does not appear that being a member of this society was any special advantage to her.

Crompton Hutton, *contra*. — First, the damage need not be pecuniary; for if that were so, an action for such slander could never be maintained by the wife, as the damage would be to the husband, and not to her. Secondly, the damage alleged is the proximate consequence of the uttering the words by the defendant. Thirdly, such damage is shown to have happened to the wife as the law will take notice of. An action will lie at the suit of a woman for words spoken by which she has lost her marriage.

[BLACKBURN, J. Marriage is matter of value in itself. *Lynch v. Knight* shows that loss of *consortium* is sufficient, if it be the natural result of the words spoken. CROMPTON, J. It is always considered to be temporal damage. COCKBURN, C. J. The loss of *consortium vicinorum* has been held not to be sufficient special damage. Com. Dig., tit. "Action on the Case for Defamation," (D. 30).]

That is admitted; but here there is more than a loss of that kind, — the wife has been turned out of the society.

[COCKBURN, C. J. But there does not appear to have been a loss of any temporal advantage.]



She has lost her *status*. The judgment of Lord CAMPBELL in *Lynch v. Knight* shows that there may be a loss of *status* to a married woman which may be sufficient special damage.

M'Intyre was not heard in reply.

COCKBURN, C. J. I am of opinion that our judgment must be for the defendant. As the declaration now stands, no cause of action is shown, and the special damage which is set out in order to make the words actionable fails in having that effect. It is admitted that by the law, as now settled, the loss of the *consortium vicinorum* would not be sufficient as special damage; and I am of opinion that the loss of membership in this society either amounts to no more than the *consortium vicinorum*, or else that it amounts to the loss of the nominal distinction that she was enabled to call herself a member of this society. There is therefore nothing to show a loss of any real or material advantage; and the plaintiff's counsel has failed to make out that there has been any loss of the seat in the chapel, or of the opportunity of attending at the divine worship in that place. If there had been anything substantial or which by right could attach to the membership of the society, and which the wife had lost by reason of the words spoken, I should have thought that sufficient special damage could be shown, and I think that the law is very cruel in

preventing a woman who has been thus wantonly slandered [\* 251] from bringing an action for the purpose of vindicating her character; but as the law now stands, and

which I very much regret, such an action is not maintainable, unless some substantial or material damage can be shown to have resulted from the speaking of the words. If upon inquiry it is found there is anything which can be averred sufficiently as special damage, the plaintiffs may have leave to amend the declaration; but at present we must give judgment for the defendant.

CROMPTON, J. I am of the same opinion. If any such leave is given as is suggested by my Lord, the amendment should be made at once, so that the cause may be tried at the coming Assizes. I agree with my Lord, that this case falls within the rule that has been laid down, that the loss of *consortium vicinorum* is not sufficient, and that the loss must be temporal in its nature. This is a case of that kind where there is no loss of a temporal nature, and seems to be an attempt to make the words actionable by averring special damage of this nature. Every one must feel

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the hardship inflicted by the law in such a case; but we must draw the line somewhere, and we must remember that if we held that the rule did not apply to a case so cruel and disparaging as the present, we should also be obliged to hold that it would not apply to a case of slight misconduct, as, for instance, the allegation that a man had sworn an oath, and that by reason of the allegation the plaintiff had suffered some very slight special damage. We must remember that we should not be acting merely in a case of this kind; but that we should be giving a decision which would apply to the case of all disparaging words spoken of another person. It is said that it is a damage to be prevented from attending divine worship; but that would not be so in this case, — the female plaintiff could not be prevented from attending and occupying a seat in the chapel. On the whole, it seems to me that the allegation only amounts to an alleged loss of *consortium vicinorum*, and there being no allegation of special damage of a material nature, there must be judgment for the defendant.

BLACKBURN, J. It must be admitted that the law upon this subject does not stand upon a very satisfactory basis; but it is clear that words imputing unchastity to a woman are not actionable, unless special damage can be shown; and that can only be done by showing an injury to the material interests of the person slandered. What is shown here amounts to no more than the loss of *consortium vicinorum*. *Judgment for the defendant.*

## ENGLISH NOTES.

Though the case of *Roberts v. Roberts* remains unshaken by decision, its effect is modified by the Slander of Women Act 1891, 54 & 55 Vict. c. 51, which enacts that words imputing unchastity or adultery to a woman or girl shall be actionable without proof of special damage.

Special damage is the gist of the action of slander except in slander actionable *per se*. *Dixon v. Smith* (1860), 5 H. & N. 450, 29 L. J. Ex. 125, was an action by a surgeon for slander. The defendant, in conversation with A., had imputed to the plaintiff the paternity of a bastard child. A. had consequently refused to employ the surgeon in his profession. Held, that damages could be recovered in respect of the loss of that employment.

A declaration by the husband and wife alleged that the defendant falsely and maliciously spoke certain words imputing incontinence to the wife, whereby she lost the society of her neighbours, and became ill and unable to attend to her necessary affairs and business, and that

her husband incurred cost in curing her, and lost the society and assistance of the wife in his domestic affairs. It was held that no action lay, as no special damage was laid. *Allsopp v. Allsopp* (1860), 5 H. & N. 534, 29 L. J. Ex. 315.

A trader published an account of his own goods and compared them with those of another trader, declaring these to be inferior to his own. It was held that no action lay though the plaintiff may have suffered loss on account of the publication, and though the statement may be false. *Young v. Macrae* (1863), 3 B. & S. 264, 32 L. J. Q. B. 6.

The slander complained of consisted in the statement made by the defendant, "I can prove that J. D.'s wife had connection with a man named L. two years ago, but I would rather have the tongue cut out of my mouth than separate man and wife." Special damage set up was that the plaintiff was thereby injured in her character and reputation, and became alienated from and deprived of the society of her husband, and also of the society of her friends; and that several friends named had withdrawn from her companionship and had ceased to be hospitable to her. It was held that the loss of the hospitality of friends was a sufficient special damage to make the slander actionable. *Davies v. Solomon* (1872), L. R., 7 Q. B. 112, 41 L. J. Q. B. 10, 25 L. T. 799, 20 W. R. 167.

A declaration alleged that the plaintiff was a grocer and draper, and that his wife assisted him in the business; and that on account of an imputation of adultery made against her by the defendant, certain persons named and others had ceased to deal with the plaintiff. At the trial, general, though not any particular loss of custom was proved. It was held that sufficient special damage was alleged and proved. *Ridling v. Smith* (1876), 1 Ex. D. 91, 45 L. J. Ex. 281, 34 L. T. 500, 24 W. R. 487.

Loss of the chance of being elected a member of a club is not special damage. Hence where some words of the defendant induced the members of a club to retain certain regulations proposed to be altered, which made the plaintiff ineligible, the plaintiff was nonsuited. *Chamberlain v. Boyd* (C. A. 1883), 11 Q. B. D. 407, 52 L. J. Q. B. 277, 48 L. T. 328, 31 W. R. 572.

The plaintiff was elected town councillor of a district. The defendant, after the election, but before the plaintiff had taken the oaths or acted, spoke words of him imputing that he was a drunkard and unfit for the council. Held, no special damage disclosed, as the office was not one of profit. *Alexander v. Jenkins* (C. A. 1892), 1892, 1 Q. B. 797, 61 L. J. Q. B. 634, 66 L. T. 391. But words imputing dishonesty or malversation in a public office are actionable *per se*. *Booth v. Arnold* (C. A. 1895), 1 Q. B. 571.

Slanders actionable *per se* are: —

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- (i) When the words impute an indictable offence to the plaintiff.
- (ii) When the words impute a contagious illness to the plaintiff.
- (iii) When the words impute something which would naturally injure a person in his trade, profession, or business.
- (iv) by statute — When the words impute unchastity to a woman or girl.

Special damage must also be proved in actions for malicious prosecution. In an action by an execution debtor against a creditor for maliciously arresting him for the whole amount recovered by the judgment, whereas part thereof had been previously satisfied, the damage alleged was that the plaintiff incurred expenses in maintaining himself during the period of incarceration and in obtaining his discharge. Held, that this was special damage. *Jennings v. Florence* (1857), 2 C. B. (N. S.) 467, 26 L. J. C. P. 277.

A malicious petition presented for winding-up a company gives rise to an action without proof of special damage. *The Quartz Hill Consolidated Gold Mining Company v. Eyre* (C. A. 1883), 11 Q. B. D. 674, 52 L. J. Q. B. 488, 49 L. T. 249, 31 W. R. 668.

Slander of title is another action which requires allegation and proof of special damage. *Lowe v. Harewood*, Sir W. Jones, 196; *Tasborough v. Day*, Cro. Jac. 484; *Manning v. Avery*, Keble, 153; *Cane v. Goulding*, Style 169; *Malachy v. Soper* (1836), 3 Bing. N. C. 371. In the last mentioned case, the plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in chancery to which the present plaintiff had demurred. The defendant had falsely published in a newspaper that the demurrer had been overruled, that a receiver had been appointed, and that persons duly authorised had arrived at the mine. It was held by TINDAL, C. J., that no action lay. Speaking of what constitutes special damage in an action of slander of title, he said, "The doctrine of the older cases is that the plaintiff ought to aver, that by the speaking he could not sell or lease (Cro. Eliz. 197, Cro. Car. 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale (R. 1 Roll. 244). Admitting however that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in an action for slander of title, there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, that the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no



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right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he would otherwise have done. And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require.”

If a patentee, in bad faith, or knowing that he has no valid patent, threatens customers of a rival patentee with proceedings, with a view to the injury of his rival in his trade, he is liable in damages for slander of title. *Halsey v. Brotherhood* (1880), 15 Ch. D. 514, 49 L. J. Ch. 786, 43 L. T. 366, 29 W. R. 9. Affirmed (C. A. 1881), 19 Ch. D. 386, 51 L. J. Ch. 233, 45 L. T. 640, 30 W. R. 279.

W., proprietor of V.'s food for infants, bought from M. and sold to his customers M.'s infant's food. W. was in the habit of affixing to the wrappers on M.'s food a label stating that V.'s food was more nutritious. Held, that no action lay for the disparagement of M.'s food without proof of special damage. *White v. Mellin* (1895), 1895 A. C. 154, 64 L. J. Ch. 308, No. 13 of “Defamation” (Libel and Slander), 9 R. C.

Special damage must be proved in actions of seduction. Such damages consist in the loss of some service performed by the girl seduced to the plaintiff, and are dependent on the relation of master and servant subsisting between the plaintiff and the girl at the time of seduction. *Darries v. Williams* (1848), 10 Q. B. 725; *Gladney v. Murphy* (1890), 26 L. R., Ir. 651.

Where the action is brought by the father of the girl who is living with him and is liable to his control and command, it is sufficient to show that she was enticed away while this relation subsisted, and no proof of any particular act of service is necessary, the right to the service being implied by the fact that the girl was living in family with her father. *Evans v. Walworth* (1867), L. R., 2 C. P. 615.

In *Manley v. Field* (1860), 7 C. B. (N. S.) 96, 29 L. J. C. P. 79, it was held that the mere fact of a daughter assisting in supporting the family and conferring some benefits on the father who lodged elsewhere, did not constitute services. Nor did the fact that the girl, with the consent of her mistress, by her needlework assisted her mother who was a widow but with whom she was not residing, enable the mother to maintain an action. *Thomson v. Ross* (1863), 5 H. & N. 16, 29 L. J. Ex. 1. A somewhat similar case is that of *O'Reilly v. Gilcey* (1892), 32 L. R., Ir. 316.

In *Rist v. Faur* (Ex. Ch. 1863), 4 B. & S. 409, 32 L. J. Q. B. 386, the father was held entitled to maintain an action for the seduction of his daughter who had to serve the defendant for eleven hours during

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the day, slept at her father's, and after her day's work performed some services for him.

In *Terry v. Hutchinson* (1868), L. R., 3 Q. B. 599, 37 L. J. Q. B. 257, 9 B. & S. 487, the plaintiff's daughter, a minor, was seduced while journeying from the house of the master, from whose service she had been dismissed, to her father's. It was held that the girl was constructively in her father's service at the time of the seduction, and that the father could maintain an action.

A. lived as governess at B.'s house, and it was part of the engagement that she should spend her Christmas and midsummer holidays at her mother's. On one occasion not during these holidays, B. had allowed A. to spend four days at her mother's. During these four days she was seduced. Whenever she was at her mother's house she assisted her in the household duties. It was held that the mother could not recover damages, for the relation of master and servant did not exist at the date of the seduction. *Hedges v. Tagg* (1872), L. R., 7 Ex. 283, 41 L. J. Ex. 169, 20 W. R. 976. KELLY, C. B., suggested that the case might have been different if the occurrence had taken place during the Christmas holidays, when it was part of the contract that she was to return home.

The loss of service is presumed from seduction of a woman while living in the father's or widowed mother's house, however short may be the subsequent time when she would have remained there if this had not taken place. *Long v. Keightly* (1877), 11 Ir. Rep. C. L. 221.

In *Gladney v. Murphy* (1891), 26 L. R., Ir. 651, the father was held not entitled to recover damages for seduction of his daughter by his master while in his service, although she intended to and did return home after the termination of the service.

In order to maintain an action for a common or public nuisance the plaintiff must prove that he has suffered a particular, direct, and substantial injury. This subject is treated at length in the rules and cases Nos. 7 & 8 of "Action," and notes, 1 R. C. 573-622. The following are cases in which actions of this kind have been substantiated:

A. was an auctioneer and received large quantities of goods to be sold at his rooms. The plaintiff kept a coffee-house near to these rooms. He complained that vans delivering the goods to A. blocked up the public street, so as to darken his coffee-shop, and to compel him to burn gas during daylight, and that, owing to the unpleasant smell caused by the horses, customers were unwilling to frequent his house. Held, that this was substantial injury to the plaintiff. *Benjamin v. Storr* (1874), L. R., 9 C. P. 400, 43 L. J. C. P. 162, 30 L. T. 362, 22 W. R. 631. In *Harris v. Mobbs* (1878), 3 Ex. D. 268, 39 L. T. 164, 27 W. R. 154, the defendant left a house-van, attached to a steam-

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engine and plough, for the night, on the side of a public road about five feet from the metalled part of the road. The plaintiff's testator drove along the road in a cart drawn by a horse which was a kicker; the horse shied at the van and began kicking, fell and kicked the testator as he rolled out of the cart, wherefrom he died. The jury found that the obstruction to the highway was the direct cause of the death. Held, that the defendant was liable. A similar decision was given in *Brown v. Eastern and Midlands Railway Company* (C. A. 1889), 22 Q. B. D. 391, 58 L. J. Q. B. 212, and in *Wilkins v. Day* (1884), 12 Q. B. D. 110, 49 L. T. 399, 32 W. R. 123; *Fenna v. Clare* (1895), 1895, 1 Q. B. 199, 64 L. J. Q. B. 238.

In *Fritz v. Hobson* (1880), 14 Ch. D. 542, 49 L. J. Ch. 321, 42 L. T. 225, 28 W. R. 459, damages were awarded in respect of loss of custom occasioned by building operations that might have been carried on so as to cause less obstruction of a highway.

A local authority may maintain an action if their property is injured by a common nuisance. *Attorney-General v. Logan* (1891), 1891, 2 Q. B. 100, 65 L. T. 162; *Attorney-General v. Conduct Colliery Company* (1895), 1895, 1 Q. B. 301, 64 L. J. Q. B. 207, 71 L. T. 771.

## AMERICAN NOTES.

1. In libel and slander special damage must be alleged and proved. *Townshend on Slander and Libel*, sects. 130, 345; *Swan v. Tappan*, 5 Cushing (Mass.), 104; *Kendall v. Stone*, 5 New York, 14; *Hamilton v. Walters*, 4 Up. Can. Q. B. (O. S.) 24; *Birch v. Benton*, 26 Missouri, 153; *Johanson v. Roberts*, 8 Porter (Alabama), 486; *Barnes v. Trundy*, 31 Maine, 321; *Wilson v. Runyon*, Wright (Ohio), 651; *Bostwick v. Nickelson*, Kirby (Connecticut), 65; *Bassell v. Elmore*, 48 New York, 561; *Hersch v. Ringwalt*, 3 Yeates (Pennsylvania), 508; 2 Am. Dec. 392; 3 Sutherland on Damages, p. 663; *Hirshfield v. Ft. Worth Nat. Bank*, 83 Texas, 452; 15 Lawyers' Rep. Annotated, 639, and cases cited; *Stewart v. Minnesota Tribune Co.*, 40 Minnesota, 101; 12 Am. St. Rep. 696. See note, 72 Am. Dec. 528.

2. "Loss of *consortium vicinorum* is not sufficient." Citing *Lynch v. Knight*, *Townshend on Slander and Libel*, sect. 198. This is supported by *Bassell v. Elmore*, *supra*; *Geisler v. Brown*, 6 Nebraska, 254. The damage must be of a pecuniary character, as for example, the loss of accustomed gratuitous entertainment. *Pettibone v. Simpson*, 56 Barbour (New York), 492; *Williams v. Hill*, 19 Wendell (New York), 305. The same is held of loss of society, in *Woodbury v. Thompson*, 3 New Hampshire, 194. The damage must be pecuniary. *Terrilliger v. Wauls*, 17 New York, 62. "It is not enough that he has suffered pain of mind, lost the society or good opinion of his neighbours, or the like, unless he has also been injured in his estate or property. It is enough, however, that the slander has prevented the party from receiving something of value which would otherwise have been conferred, though

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gratuitously." *Beach v. Ranney*, 2 Hill (New York), 309, citing *Moore v. Meagher*, 1 Taunt. 39.

3. The precise question of the loss of the society of a spouse does not seem to have been considered in this country. The *Roberts case* is cited on this point by our text-writers.

*Roberts v. Roberts* is cited by Townshend on Libel and Slander, sect. 59, 198, by Newell on Defamation, and both principal cases are cited by Sutherland on Damages, p. 663.

SECTION II. — *Measure of Damages.*

NO. 6. — VICTORIAN RAILWAYS COMMISSIONERS  
v. COULTAS.  
(J. C. 1888.)

## RULE.

DAMAGES that are not the natural, probable, immediate or proximate consequence of a wrongful act are not recoverable.

By a negligent act of the defendant a collision with a railway train at a level crossing became imminent, but the actual collision was avoided. A nervous shock or mental injury, caused by fright at the occurrence, was held too remote a consequence of the defendant's act to be a ground of damage.

(PRIVY COUNCIL.)

**Victorian Railways Commissioners v. Coultas** (Appeal from  
the Supreme Court of Victoria).<sup>1</sup>

13 App. Cas. 222-226 (s. c. 57 L. J. P. C. 69; 58 L. T. 390; 37 W. R. 129).

*Negligence. — Nervous Shock resulting from Fright. — Damages too [222]  
remote.*

Damages in a case of negligent collision must be the natural and reasonable result of the defendants' act: damages for a nervous shock or mental injury caused by fright at an impending collision are too remote.

Where the gatekeeper of a railway company had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the

<sup>1</sup> *Present*: — Lord FITZGERALD, Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir RICHARD COUCH.



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jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical and mental injuries occasioned by the fright, —

*Held*, that the verdict could not be sustained, and that judgment must be entered for the defendants.

*Quære*, whether proof of "impact" was necessary to maintain the action.

Appeal from an order of the Supreme Court (Dec. 14, 1886), entering judgment for the plaintiffs in two several sums of £342 2s. and £400, and costs of action. The facts of the case and the proceedings in the action are stated in the judgment of their Lordships.

Cohen, Q. C., and Gurner (Finlay, Q. C., with them) for the appellants, contended that the damages claimed were too remote. Damages could not be recovered for mental injuries caused by negligent acts of the appellants when there was an absence of all physical damage caused by the appellants' negligence. The liability is for the ordinary and immediate consequences of negligence. A mere nervous shock caused by fright of an impending event which never happens results from the constitution and circumstances of the individual, and does not give a cause of action,

to support which there must be physical injury directly [\*223] \*resulting from the negligent act or omission. Refer-

ence was made to *The Notting Hill*, 9 P. D. 105; 53 L. J. P. D. & A. 56; *Huxley v. Berg*, 1 Stark. 98.

Gainsford Bruce, Q. C., and Archibald, for the respondents, contended that proof of impact was not necessary to support the action. The negligent acts of the defendants necessarily caused great fright at the serious imminence of a collision. Both physical and mental injuries resulted, and the jury were right in awarding damages therefor. Reference was made to *Jones v. Boyce*, 1 Stark. 493 (18 R. R. 812), distinguishable from *Huxley v. Berg*; *Sneeshy v. Lancashire and Yorkshire Railway Company*, 1 Q. B. D. 42; 45 L. J. Q. B. 1. [Sir BARNES PEACOCK referred to *Boyle v. Brandon*, 13 M. & W. 738, as to remoteness of damages.] *Hill v. New River Company*, 9 B. & S. 303; *Vandenburgh v. Truax*, 4 Denio, Sup. Ct. N. Y. Rep. 464; *Martin v. Shoppee*, 3 C. & P. 373.

Cohen, Q. C., replied.

The judgment of their Lordships was delivered by  
Sir RICHARD COUCH:—

The respondents brought a suit against the appellants in the Supreme Court of the colony of Victoria to recover damages for

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injuries sustained by the respondent Mary Coultas, through the negligence of a servant of the appellants, and expenses incurred by the respondent James Coultas, her husband, through her illness. The statement of claim stated that, through the negligence of the servant of the defendants in charge of a railway gate at a level crossing, the plaintiffs, while driving over the level crossing, were placed in imminent peril of being killed by a train; and, by reason of the premises, the plaintiff, Mary Coultas, received a severe shock, and suffered personal injuries, and still suffered from delicate health and impaired memory and eyesight. The defendants, by their defence, denied the allegations in the statement of claim, and further said they would contend \* that no cause of action [\* 224] was disclosed by it, as it was not stated that either the plaintiffs or their property were struck or touched by the train of the defendants; and, further, that the alleged damage arising from shock or fright, without impact, was too remote to sustain the action.

The facts proved at the trial before Mr. Justice WILLIAMS, a judge of the Supreme Court, and a jury, were that on or about the 8th of May, 1886, about nine in the evening, the respondents, together with John Wilson, a brother of the wife, were driving home in a buggy from Melbourne to Hawthorn, which is near Melbourne. They had to cross a level crossing on the line of railway from Melbourne to Hawthorn. When they came to it the gates were closed, and the gate-keeper came and opened the gates nearest to them and then went across the line to the gates on the opposite side. The respondents followed him, and had got partly on to the up line (the farther one) when a train was seen approaching on it. The gatekeeper directed them to go back, but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He got the buggy across the line so that the train, which was going at a rapid speed, passed close to the back of it and did not touch it. As the train approached Mary Coultas fainted, and fell forward in her brother's arms. The medical evidence showed that she received a severe nervous shock from the fright, and that the illness from which she afterwards suffered was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said

he was unable to detect any physical damage; he put down her symptoms to nervous shock.

The jury found that the defendants' servant negligently opened the gate and invited the plaintiffs to drive over the level crossing when it was dangerous to do so, and that the plaintiffs could not have avoided what had occurred by the exercise of ordinary care and caution on their part. And they assessed the male plaintiff's damages at £342 2s., and the female plaintiff's at £400, leave being granted to either side to move for judgment after the full Court

had decided points reserved. The points reserved were:—

[\*225] \*1. Whether the damages awarded by the jury to the plaintiffs, or either of them, are too remote to be recovered?

2. Whether proof of "impact" is necessary in order to entitle plaintiffs to maintain the action?

3. Whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendants?

The full Court, consisting of Mr. Justice WILLIAMS, and two other Judges, answered that the damages awarded were not too remote to be recovered; that proof of "impact" was not necessary; and that the female plaintiff could recover damages for physical and mental injuries occasioned by the fright. Thereupon judgment was entered for the plaintiffs for the amounts awarded, and the present appeal is from that judgment. The defendants did not move for a new trial, and consequently they cannot now contend that there was contributory negligence on the part of the plaintiffs.

The rule of English law as to the damages which are recoverable for negligence is stated by the MASTER OF THE ROLLS in *The Notting Hill*, 9 P. D. 105, 53 L. J. P. D. & A. 56, a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act. The law would be the same in Victoria unless it has been otherwise enacted by the Legislature, which it is not said it has been.

According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their

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Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account \* of men- [\* 226] tal injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English Courts in which, upon such facts as were proved in this case, damages were recovered. The decision of the Supreme Court of New York which he referred to in support of his contention was a case of a palpable injury caused by a boy, who was frightened by the defendant's violence, seeking to escape from it, and is like the case of *Sneesby v. Lancashire and Yorkshire Railway Company*, 1 Q. B. D. 42; 45 L. J. Q. B. 1. It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants. They will therefore humbly advise Her Majesty to reverse the judgment for the plaintiffs, and to order judgment to be entered for the defendants, with the costs of the action and of the argument of the points reserved and the motion for judgment. The respondents will pay the costs of this appeal.

#### ENGLISH NOTES.

Generally damages are too remote a consequence of a wrongful act, when they do not ordinarily follow the wrongful act. In *Ashley v. Harrison* (1793), 1 Peake, 256, 1 Esp. 48, 3 R. R. 686, A. libelled a concert singer who on that account refused to sing at B.'s oratorio. It was held that the injury to B. was too remote a consequence of A.'s action. So where A. had beaten an actor who on that account was not able to appear at B.'s theatre, B. was held not to have a right of action against A. *Taylor v. Neri* (1795), 1 Esp. 386.



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In *Knight v. Gibbs* (1834), 1 Ad. & El. 43, a landlord complained to a tenant who was mistress of the house that her lodgers, of whom the plaintiff was one, behaved improperly at the window. The plaintiff laid as special damage that she was turned out of her lodging and employment (as a straw plaiter in the employ of the mistress of the house) in consequence of the statement. The mistress stated that she had dismissed the plaintiff not because she believed the statement, but because she was afraid it would offend the landlord if the plaintiff remained. It was held that the special damage laid was not too remote.

The commissioners of an inland navigation in pursuance of a statute executed a lease of the navigation and the tolls. The lock fell out of repair and the commissioners failed to give notice to the lessee to repair it. The lock fell in, and the plaintiff and his barge with a cargo of wheat was consequently detained at the lock. It was held that the falling in of the lock was too remote a consequence of the failure of the commissioners to give notice. *Walker v. Goe* (Ex. Ch. 1859), 4 H. & N. 350, 28 L. J. Ex. 184.

A judgment or conviction passed against the plaintiff as the result of a conspiracy between the defendant and others is not a good cause of action, unless it appears that the conviction was intended as the object of the conspiracy. *Barber v. Lissiter* (1860), 7 C. B. (N. S.) 175, 29 L. J. C. P. 161, 6 Jur. N. S. 654.

Injuries consequent on non-repair of fences or gates have often engaged the attention of the Courts. Whether the injury is remote or not depends on the same considerations as in ordinary cases. In *Lee v. Riley* (1865), 18 C. B. (N. S.) 722, 34 L. J. C. P. 212, the defendant's gate, which he was bound to keep in repair, being out of order, his horse escaped into an occupation road, and strayed into the plaintiff's field. There he kicked and injured the plaintiff's horse. It was held that the injury was not too remote a consequence of the non-repair. In *Wilson v. The Newport Dock Company* (1866), L. R., 1 Ex. 177, 35 L. J. Ex. 97, 14 L. T. 230, 14 W. R. 558, 4 H. & C. 232, the defendant's dock gate could not be opened owing to a defect in one of the chains. The plaintiff's ship could not therefore be admitted into the dock. She grounded. It was held that, in absence of negligence on the part of the plaintiff, the injury was not too remote. See also *Groucott v. Williams* (1863), 4 B. & S. 149, 32 L. J. Q. B. 237, 8 L. T. 458; *Lawrence v. Jenkins* (1873), L. R., 8 Q. B. 274, 42 L. J. Q. B. 147, 28 L. T. 406, 21 W. R. 577; *Pretty v. Bickmore* (1873), L. R., 8 C. P. 401, 28 L. T. 704, 21 W. R. 733; *Grinnell v. Eamer* (1875), L. R., 10 C. P. 658, 32 L. T. 835; *Firth v. Bowling Iron Works Company* (1878), 3 C. P. D. 251, 47 L. J. C. P. 358, 38 L. T. 568, 26 W. R. 558; *Hawken v.*

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*Shearer* (1887), 56 L. J. Q. B. 284; *Welch v. Anderson* (C. A. 1891), 61 L. J. Q. B. 167, 66 L. T. 442.

So if railway companies do not perform their statutory duty (see Railways Clauses Consolidation Act 1845, sect. 68) of keeping the fences in repair they are liable to owners and lawful occupiers of adjacent lands whose cattle stray on to the line through the fence and are damaged. *Buxton v. North-Eastern Railway Company* (1868), L. R., 3 Q. B. 549, 37 L. J. Q. B. 258, 18 L. T. 795, 16 W. R. 1124, 9 B. & S. 824 (*per* BLACKBURN, J.); *Dawson v. Midland Railway Company* (1872), L. R., 8 Ex. 8, 42 L. J. Ex. 49, 21 W. R. 56; *Corry v. Great Western Railway Company* (C. A. 1881), 7 Q. B. D. 322, 50 L. J. Q. B. 386, 44 L. T. 701, 29 W. R. 623.

But damages are not recoverable for loss due to non-repair of fences, where there is no duty to keep the fences in repair. *Bolch v. Smith* (1862), 7 H. & N. 736, 31 L. J. Ex. 201; *Binks v. South Yorkshire Railway Company* (1863), 3 B. & S. 244, 32 L. J. Q. B. 26; *Matson v. Baird* (1878), 3 App. Cas. 1082, 39 L. T. 304, 26 W. R. 835; *Wiseman v. Booker* (1878), 3 C. P. D. 184, 38 L. T. 292, 26 W. R. 634.

Another class of cases in which the question of remoteness arises may be exemplified thus: A. does a wrongful or unlawful act. An event X. happens, and B. is injured by the combined effect of the wrongful act of A. and of the event X. If the event X. is such that it would naturally or probably have followed the act of A., the injury to B. is not too remote. For instance, A.'s vessel through the negligence of his servants took the ground, and became unmanageable in consequence. Owing to the wind and tide it was driven upon a sea wall of the plaintiff's, which it damaged. Having regard to the weather and tide, it was impossible to prevent this, the ship having once grounded. It was held, affirming the judgment of the Court below, that the defendants were liable for the damage caused to the wall. *Jurats &c. of Romney Marsh v. Corporation of Trinity House* (1871), L. R., 5 Ex. 204, 39 L. J. Ex. 163, 22 L. T. 446, 18 W. R. 869, affirmed (Ex. Ch.) L. R., 7 Ex. 247, 41 L. J. Ex. 106.

On the other hand, if the event X. is such that it would not have naturally or probably followed the wrongful act of A., the injury to B. is too remote. For instance, A.'s servant, in contravention of a valid municipal by-law, washes a van in a public street, and allows the water to run down the gutter towards a grating leading to a sewer. The grating is obstructed, but not to the knowledge of A. or his servant. The water flows over a causeway, which is ill-paved and uneven. A sudden frost freezes this water. B.'s horse, while being led past the spot, slips on the ice and breaks its legs. The injury is too remote a consequence of A.'s wrongful act. *Sharp v. Powell* (1872), L. R., 7 C. P. 253, 41

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L. J. C. P. 95, 26 L. T. 436, 20 W. R. 584. See also *Adams v. Lancashire & Yorkshire Railway Company* (1869), L. R., 4 C. P. 739, 38 L. J. C. P. 277, 20 L. T. 850, 17 W. R. 884; *Metropolitan Railway Company v. Jackson* (1878), 3 App. Cas. 193, 47 L. J. C. P. 303, 37 L. T. 679, 26 W. R. 175. Also cases cited under "Accident" 1 R. C. p. 203 *et seq.*

Similar to this, is the following type of cases: A. does a wrongful act. C. intervenes, and B. is injured from the combined effects of the acts of A. and C. The test of A.'s liability to B. is the same as in the previous examples. For instance, A., as occupier of certain premises used by him as a place of sports, erected a barrier across a private road adjoining these premises and leading thereto as well as to other premises. A. had no right in the road except a right of way in common with others. The barrier was placed with the object of preventing vehicles from coming up so as to overlook the sports. The barrier consisted of spiked hurdles placed across either side of the roadway, the space between them, sufficient for a vehicle to pass, being ordinarily left open. When sports were going on, A. was in the habit of closing this opening by means of a pole placed across from hurdle to hurdle. The placing of the barrier was admitted to be wrongful. Some person had displaced one of the hurdles; and, the night being dark, B. lawfully passing along the road comes into collision with the hurdle and loses his eye. A. was held liable to B. *Clark v. Chambers* (1878), 3 Q. B. D. 327, 47 L. J. Q. B. 427, 38 L. T. 454, 26 W. R. 613. See also *Wetton v. Dunk* (1864), 4 Fost. & Fin. 298; *Burrows v. March Gas & Coke Company* (Ex. Ch. 1871), L. R., 7 Ex. 96, 41 L. J. Ex. 46, 26 L. T. 318, 20 W. R. 493. For the other side of the question see *Bar v. Jobb* (1879), 4 Ex. D. 76, 48 L. J. Ex. 417, 41 L. T. 97, 27 W. R. 415, cited 1 R. C. p. 270.

The same rule is exemplified in regard to the repetition of slander. If A. makes a statement to C. which is slanderous against B., and is such that it is C.'s duty to report it to B.'s employer, and B. is in consequence dismissed from his employment, there is sufficient evidence of special damage in an action by B. against A. *Kendillon v. Malthy* (1842), 1 Car. & M. 402 (*per* Lord DENMAN at p. 408). Lord DENMAN's decision on this point is good authority for the above proposition although he non-suited the plaintiff on another point, and although his statement of the law as to privilege has been dissented from by the judgments of the Court of Appeal in *Munster v. Lamb* (1883), 11 Q. B. D. 588, 608, 52 L. J. Q. B. 726, 49 L. T. 252, 32 W. R. 248.

But if C. voluntarily repeated the slander, A. is not liable. *Ward v. Weeks* (1830), 7 Bing. 211; *Parkins v. Scott* (1862), 31 L. J. Ex. 331. It has been held on the other hand that special damage may be

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shown by a general falling off of the plaintiff's business, through words spoken under circumstances which render it likely that the slander will be disseminated so as to have that effect. *Riding v. Smith* (1876), 1 Ex. D. 91, 45 L. J. Ex. 281, 34 L. T. 500, 24 W. R. 487; *Ratcliffe v. Evans* (C. A. 1892), 1892, 2 Q. B. 524, 61 L. J. Q. B. 535, 66 L. T. 794, 40 W. R. 578.

The doctrine of contributory negligence turns on the same principle. If A. and B. have both been negligent, and the injury to B. is due directly to the negligence of A. he is liable to B. The leading case is *Tuff v. Warman* (Ex. Ch. 1858), 5 C. B. (N. S.) 573, 27 L. J. C. P. 222, 5 Jur. N. S. 222. The action was against the pilot of a Thames steamer for running down a barge. Though no look-out was kept on the plaintiff's barge, the defendant was held liable, as he could have, by ordinary care, avoided the consequence of the plaintiff's negligence. So also in *Rudley v. London & North-western Railway Company* (1876), 1 App. Cas. 754, 46 L. J. Ex. 573, 35 L. T. 637, 25 W. R. 147; *The Dublin, Wicklow & Wexford Railway Company v. Slattery* (1878), 3 App. Cas. 1155, 39 L. T. 365, 27 W. R. 191; *Spaight v. Tedcastle* (1881), 6 App. Cas. 217, 44 L. T. 589, 29 W. R. 761; *The Vera Cruz* (1884), 9 P. D. 96, 53 L. J. P. 33, 51 L. T. 104, 32 W. R. 783. For earlier cases see *Butterfield v. Forrester* (1809), 11 East 60, 10 R. R. 433; *Davies v. Mann* (1842), 10 M. & W. 546, 12 L. J. Ex. 10, 6 Jur. 954.

On the other hand, if the negligence of B. is the direct cause of his injury, the negligence of A. is too remote a cause. *Flower v. Adams* (1810), 2 Taunt. 314, 11 R. R. 591; *Ellis v. London & South Western Railway Company* (1857), 2 H. & N. 424, 26 L. J. Ex. 349; *Wilkinson & Fairie* (1863), 1 H. & C. 633, 32 L. J. Ex. 73; *Witherley v. Regent's Canal Company* (1863), 12 C. B. (N. S.) 2, 3 F. & F. 61, 6 L. T. 255; *Richardson v. Metropolitan Railway Company* (1868), 37 L. J. C. P. 300; *Gee v. Metropolitan Railway Company* (1873), L. R., 8 Q. B. 161, 42 L. J. Q. B. 105, 28 L. T. 282, 21 W. R. 584; *Skelton v. London & North-western Railway Company* (1867), L. R., 2 C. P. 631, 36 L. J. C. P. 249, 16 L. T. 563, 15 W. R. 925; *Smith v. St. Lawrence Tour-boat Company* (1874), L. R., 5 P. C. 308, 28 L. T. 885, 21 W. R. 569; *Darey v. London & South Western Railway Company* (C. A. 1883), 12 Q. B. D. 70, 53 L. J. Q. B. 58. In the last mentioned case, the plaintiff who had been injured on a level crossing admitted that, if he had looked along the line, he would have seen the train approach. He was nonsuited.

*Lynch v. Nordin* (1841), 1 Q. B. 29, 4 P. & D. 672, 5 Jur. 797, introduced a slight modification into the rule. The defendant negligently left a horse and cart unattended in the street. The plaintiff,



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seven years old, climbed on the cart in play, and another child led the horse on, whereby the plaintiff was thrown out and hurt. The defendant was held liable. This case was doubted in *Lygo v. Newbold* (1854), 9 Ex. 302. The tendency of later decisions is to limit the defendants' liability in such cases. In *Singleton v. Eastern Counties Railway Company* (1859), 7 C. B. (N. S.) 287, a child aged three years was injured by a passing train while sitting on a railway parapet. Held, that the company was not liable. In *Abbott v. Macfie* (1864), 2 H. & C. 744, 33 L. J. Ex. 177, the plaintiff aged seven years got upon the cover of a cellar left leaning against a wall by the defendant. The cover fell and injured the child. The defendant was held not to be liable. In *Mangan v. Atherton* (1866), L. R. 1 Ex. 239, 35 L. J. Ex. 161, 14 L. T. 411, 14 W. R. 771, 4 H. & C. 388, an oil-cake crushing machine was exposed for sale by the defendant in a public place, and left unguarded. The plaintiff, a child of four, by the direction of his brother, a child of seven, put his fingers into the machine, while a third boy was turning the handle. — with the natural consequence. MARTIN, B., held that even if the defendant were guilty of negligence, in so leaving the machine, it was far too remote, BRAMWELL, B., held that there was no negligence, and both, as well as PIGOTT, B., concurred in giving judgment for the defendant. Sir F. Pollock (on Torts) suggests that so far as it rests on the ground of remoteness this case is of doubtful authority since *Clark v. Chambers*. It was there suggested that a machine of this kind left unguarded, and without the handle being secured, might be considered as a dangerous instrument importing a liability within the principle of the case of spring-guns. *Bird v. Holbrook* (1828), 4 Bing. 628. This view is supported by the Scotch case of *Campbell v. Ord* (Court of Session 5th Nov. 1873) where the facts were almost identical with *Mangan v. Atherton*; and the fact that two such cases have actually come before the Courts strongly tends to show that such a machine does present a dangerous fascination to young children.

## AMERICAN NOTES.

See notes to *Hadley v. Barendale*, *ante*, Vol. 5, p. 525. The principle announced in the first paragraph of the rule is universally recognized here.

It is probable that the principal case is not entirely unprecedented in this country.

A somewhat analogous case is *Phillips v. Dickerson*, 85 Illinois, 11; 28 Am. Rep. 607, where a married woman sued to recover damages for fright, causing a miscarriage, and occasioned by a quarrel between the defendant and the plaintiff's husband and another, within her hearing but out of her sight, it not appearing that the defendant knew that she heard it, or knew her condition: held, that no recovery could be had.

In *Ewing v. Pittsburgh, &c. Ry. Co.*, 147 Pennsylvania State, 40; 30 Am. St.

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Rep. 709; 14 Lawyers' Rep. Annotated, 666, the action was for "great fright, alarm, fear, and nervous excitement and distress," resulting in sickness, caused by the running of a railway train into the dwelling-house of which the plaintiff was an occupant. There was no bodily injury. Held, that there could be no recovery. The Court observed, citing *Lynch v. Knight*, 9 H. L. Cas. 577: "If mere fright, unaccompanied by bodily injury, is a cause of action, the scope of what are known as accident cases will be very greatly enlarged; for in every case of a collision on a railroad, the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for the 'fright' to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge.

"Negligence constitutes no cause of action, unless it expresses or establishes some breach of duty. Addison on Torts, sec. 1338. What duty did the company owe this plaintiff? It owed her the duty not to injure her person by force or violence; in other words, not to do that which, if committed by an individual, would amount to an assault upon her person. But it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause."

"We know of no well-considered case in which it has been held that mere fright, when unaccompanied by injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. Wood fairly states the rule in his note to Mayne on Damages, at page 74: 'So far as I have been able to ascertain, the force of the rule is, that the mental suffering referred to is that which grows out of the sense of peril, or the mental agony, at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action.' In *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303, a contractor of a railroad was blasting rocks within the right of way of the road. The blast blew rocks upon the plaintiff's land, and in addition to the damage to the land, plaintiff claimed damages for fright caused by apprehension of personal injury. Held, that he could not recover. Our own recent case of *For v. Borkey*, 126 Pa. St. 164, was a case of fright from blasting, and it was said by our brother Mitchell, 'The injury was not the natural or proximate result of the act complained of.'"

In *Wyman v. Leavitt*, 71 Maine, 227; 36 Am. Rep. 303, it was held that in an action for injury to lands by blasting, the mental anxiety of plaintiff for the safety of himself and his family was not a proper element of damage. "But we have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple

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actionable negligence, can sustain an action. And the fact that no such case exists, and that no elementary writer asserts such a doctrine, is a strong argument against it." Citing *Lynch v. Knight*, *supra*. "If the law were otherwise, it would seem that not only every passenger on a train who was personally injured, but every one that was frightened by a collision or by the trains leaving the track, could maintain an action against the company."

The principal case was cited in *Haile's Curator v. Texas, &c. R. Co.*, 60 Federal Reporter, 557, where it was held that insanity resulting from the shock and excitement caused by a railroad accident to a passenger who sustained no bodily injuries will not warrant a recovery of damages. The Court argue that the carrier could not have anticipated such a result, and observe: "If the disease was not likely to result from the accident, and was not one which the defendant could have reasonably foreseen, in the light of the attending circumstances, then the accident was not the proximate cause." The Court declare that the defendant had no more reason to anticipate the result in evidence than to anticipate *grippe*, pneumonia, or any other disease.

This doctrine is found also in *Lehman v. Brooklyn City R. Co.*, 47 Hun (New York), 355; *Renner v. Canfield*, 36 Minnesota, 90; *Atchison, &c. R. Co. v. McGinnis*, 46 Kansas, 109; *Gulf, &c. R. Co. v. Trott*, 86 Texas, 412; 40 Am. St. Rep. 866, citing the principal case; *Chicago, &c. R. Co. v. Hitt*, Texas Civil Appeals.

Under a statute authorizing a recovery against a town, on account of a defective highway, for "any injury to his person," it was held that there could be no recovery for "risk and peril, which caused fright and mental suffering;" but those elements could be considered where there was a bodily injury, however slight. *Canning v. Williamstown*, 1 Cushing (Mass.), 451.

In *Johnson v. Wells, Fargo & Co.*, 6 Nevada, 224; 3 Am. Rep. 245, it was held error to instruct the jury to take into consideration the plaintiff's "pain of mind" as distinct from his bodily suffering. The question is extensively considered in this case. The decision goes further than the principal case, for it does not allow for mental suffering even where there is bodily injury, and it disapproves the Massachusetts case above cited, and the like decision in *Seger v. Barkhamsted*, 22 Connecticut, 290, where it is said, "The mind is no less a part of the person than the body." The Court say: "How can such damages be estimated in money? The mental agony of a timid woman would be entirely different from that of a bold man. No two cases could be weighed in like scales. To properly estimate such a cause of damage, the door must be opened to the realms of philosophy, physiology, and psychology." Citing *Railroad Co. v. Barron*, 5 Wallace (U. S. Sup. Ct.), 90.

"Mental suffering, . . . to become an element of damage, must be based on bodily injury, or the injury by which it is produced must be attended by circumstances of malice, insult, or oppression." *Dorrah v. Illinois C. R. Co.*, 65 Mississippi, 14; 7 Am. St. Rep. 629.

In *Borce v. Town of Danville*, 53 Vermont, 183, it was held that in an action by a married woman for a miscarriage caused by a defective highway, the plaintiff should not recover anything for her grief on account of the loss of her offspring. "If like Rachel she wept for her children and would not be

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comforted, a question of continuing damage is presented too delicate to be weighed by any scales which the law has yet invented."

In an action for forcible entry and detainer, damages are not recoverable for mental pain. *Anderson v. Taylor*, 56 California, 131: 38 Am. Rep. 52.

A passenger on a railway, negligently carried beyond her destination, may not recover for mental anxiety. *Trigg v. St. Louis, &c. Ry. Co.*, 74 Missouri, 147; 41 Am. Rep. 305.

In an action for injury to the lateral support of a lot designed for burials, there can be no recovery for injury to feelings, the defendant being ignorant of the intended use of the lot. *White v. Dresser*, 135 Massachusetts, 150; 46 Am. Rep. 454. But the contrary was held where the superintendent of a cemetery carelessly and wilfully disinterred the remains of the plaintiff's child. *Meagher v. Driscoll*, 99 Massachusetts, 281; 96 Am. Dec. 759. And so where one wrongfully dissected the body of the plaintiff's husband. *Larson v. Chase*, 47 Minnesota, 307; 28 Am. St. Rep. 370; 14 Lawyers' Rep. Annotated, 85. The Court distinguish *Lynch v. Knight*, *supra*, and say: "But where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act." And the Court cite for example an assault without impact.

This doctrine is clearly distinguishable from that which prevails in cases of wrongful breach of contract, in which frequently allowance is made for mental distress.

A few cases however hold that where there is no personal impact, but fright is occasioned by negligence, and results in physical injury, this is the proximate consequence of the negligence, and a recovery therefor is warranted. Thus in *Mitchell v. Rochester Ry. Co.*, 4 Miscellaneous Rep. 575, affirmed in 77 Hun (New York), 607, it was held that a fright negligently produced and resulting in miscarriage was actionable. The Court below observed: "There is no doubt that after the occurrence the plaintiff suffered a very serious physical ailment. The evidence of the physicians was that such an ailment might have been brought on, and was frequently brought, by a great mental shock or fright. This case therefore differs from those where there is no physical injury as the result of the negligence, but where the plaintiff suffered nothing but mental anguish or 'pain of mind.' *Wynan v. Leavitt*, 71 Maine, 227; *Johnson v. Wells, Fargo & Co.*, 6 Nevada, 224. In those cases, and in several others which were cited upon the argument, the plaintiff had claimed to recover for 'pain of mind' or mental anxiety, which had been caused by the negligent act of the defendant. It may be conceded that where no physical injury whatever has been suffered by the plaintiff, but only a severe fright, followed by no serious consequences, an action will not lie for damages on account of the negligence of the defendant." Citing *Canning v. Williamstown*, and *Ewing v. Pittsburgh, &c. R. Co.*, *supra*. The Court then discuss at length the question whether the negligence was the proximate cause of the miscarriage, and conclude that it was, citing (of course) the "Squib case." They then continue: "In several well considered cases it has been held that the defendant is liable for a physical injury caused by a mental shock, which was the direct result of the defendant's negligence. *Purcell v. St. Paul City Ry. Co.*, 48 Minnesota,



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134: *Fitzpatrick v. Gt. Western Ry. Co.*, 12 U. C., Q. B. 645." "The defendant cites the case of the *Victorian Railway Commissioners v. Coultas*, L. R. (13 App. Cases), 222. In that case the plaintiff in the Supreme Court of the Colony of Victoria recovered damages from the defendants because of the negligence of a gatekeeper on the defendant's railway, from the effect of which the plaintiff received a severe nervous shock, followed by a long illness, the consequence of the fright. Upon an appeal to the Privy Council, the judgment of the Supreme Court of Victoria was reversed. No cases seem to have been cited upon the argument, except some from the English Courts, which were not applicable. The Court decline to decide whether 'impact' upon the person of the plaintiff was necessary to enable her to recover for the physical injuries following the occurrence, but they hold that damages arising from the mere sudden terror, unaccompanied by actual physical injury, cannot be recovered. The case seems to have been decided upon the theory that there was no actual physical injury, and for the reason that mental injuries alone were not the subject of an action. No authorities are examined, and there is no particular discussion of the case. Although the Court which decided the case is one of high rank, yet the case itself does not strike me as of much authority. The weight to be given to any decided case as an authority, depends, not alone upon the rank of the Court, but upon the solidity of the reasons upon which the decision is founded, and the perspicuity and precision with which those reasons are expressed. *Yates v. Lansing*, 9 Johns. 415."

"It is not intended here to impugn the well-settled and wholesome rule that no damages can be recovered against a negligent person for purely mental suffering, unaccompanied by any physical injury. It is decided simply that where a physical injury is the natural result of the negligence, although it proceeds from a mental shock caused directly by the negligent act, the defendant is liable if the jury might find from the evidence that the shock caused the injury."

The same result was reached in *Hill v. Kimbell*, 76 Texas, 210; 7 Lawyers' Rep. Annotated, 618, where a miscarriage was produced by fright from an assault on some negroes in the plaintiff's presence. (Of this the editor of the Lawyers' Rep. Annotated says that this is perhaps the only case in which a recovery has been allowed where there was no wrong or negligence toward the plaintiff.) And so in *Barbee v. Reese*, 60 Mississippi, 906, where the miscarriage was occasioned by the threats of a drunken person to shoot the plaintiff. Consult *Stutz v. Chicago, &c. R. Co.*, 73 Wisconsin, 147; *Illinois Cent. R. Co. v. Latimer*, 128 Illinois, 163; *Olver v. La Valle*, 36 Wisconsin, 592.

In *Purcell v. St. Paul City R. Co.*, *supra*, it was held that if the negligence of a carrier places a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, an action is maintainable. The Court said: "On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious certainly as would be the breaking of an arm or a

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leg.” The principal case was cited by counsel and the Court cited (of course) the “Squib case,” and the American “Wine Cask Case,” *Vandenburgh v. Truax*, 4 Denio (New York), 464.

The Canada case above cited was very similar, and it was decided, upon demurrer, that fright negligently produced, and resulting in miscarriage, was actionable. The Court however read the declaration as if the fright and the commencement of the sickness were simultaneous, and that the allegation of fright was superfluous.

**No. 7. — FRANKLIN v. SOUTH-EASTERN RAILWAY  
COMPANY.**

(1858.)

**RULE.**

UNDER Lord Campbell’s Act (9 & 10 Vict. c. 93), the measure of damages is the pecuniary loss to a parent, child, wife, or husband, of the deceased occasioned by his death.

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3 Hurl. & Nor. 211–215 (s. c. 4 Jur. N. S. 565).

*Lord Campbell’s Act. — Measure of Damages.*

In an action on the 9 & 10 Vict. c. 93, for injury resulting from death, [211] the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm, that the son, who was young and earning good wages, assisted his father in some work for which the father was paid 3s. 6d. a week. The jury having found that the father had a reasonable expectation of benefit from the continuance of his son’s life, — *Held*, that the action was maintainable.

Declaration, on the 9 & 10 Vict. c. 93, s. 2, by the plaintiff, as administrator of Thomas Franklin, against the South-Eastern Railway Company, for negligence in carrying the said Thomas Franklin, a passenger by the railway, whereby he was killed. Plea, not guilty.

At the trial before BRAMWELL, B., at the London sittings after last Michaelmas Term, the following facts appeared: The plaintiff was a light porter at St. Thomas’s Hospital, which situation he had held for thirty-two years. The deceased, who was twenty-one

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years of age. was the son of the plaintiff and was porter to a saddler at the wages of 23s. per week. On the 28th June, 1857, the deceased was a passenger on the defendant's railway from Gravesend to London, when a collision took place through [\* 212] the negligence of the \* defendant's servants and he was killed. The plaintiff was in the habit of carrying up coals to the wards of the hospital for which he was paid 3s. 6d. a week, but in consequence of illness the deceased had for some time past carried up the coals for him,

The defendant's counsel submitted that the plaintiff had sustained no damage by the death of the deceased which entitled him to maintain the action. The learned Judge left it to the jury to say whether the plaintiff had a reasonable expectation of any and what pecuniary benefit from the continuance of his son's life. The jury found a verdict for the plaintiff for £75, and leave was reserved to the defendants to move to enter a nonsuit, if the Court should be of opinion that the action was not maintainable.

A rule *nisi* having been obtained accordingly,

Francis showed cause (April 22). The 9 & 10 Vict. c. 93, s. 1, enacts, "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." By section 2: "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused," &c. ; "and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought," &c. The plaintiff has sustained a damage by the death of his son, which entitles him to maintain the action. The case of *Blake v. The Midland*

[\* 213] \* *Railway Company*, 18 Q. B. 93; 21 L. J. Q. B. 233, established this principle, that the jury, in estimating the damage, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only. Here the plaintiff, who was old and infirm, had received assistance from his son to the extent of 3s. 6d. a week; and the jury found that

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he had a reasonable expectation of pecuniary benefit from the continuance of his son's life.

Edwin James and Petersdorff, in support of the rule.

The plaintiff has sustained no damage which entitles him to maintain the action. He was under no contract to carry the coals, and his employment in that respect was eleemosynary only. The assistance of his son was a mere act of kindness, which might have been discontinued at any time. It resembles that of a present made by one member of a family to another. An action of this kind must be based on some pecuniary loss capable of calculation. The statute requires the jury to assess the damages with reference to the injury resulting from the death. [BRAMWELL, B., referred to Burn's Justice, tit. "Poor," s. 13, p. 98, ed. 29.]

*Cur. adv. vult.*

The judgment of the Court was now delivered by —

POLLOCK, C. B. In this case, the plaintiff, as administrator of his son, sued (under the statute 9 & 10 Vict. c. 93) the defendants, by the negligence of whose servants his son's death was caused; and the question was if he was entitled to maintain the action, it being contended that it was necessary the plaintiff should show a damage, and that he had shown none.

The statute does not in terms say on what principle the \*action it gives is to be maintainable, nor on what prin- [\*214] ciple the damages are to be assessed; and the only way to ascertain what it does, is to show what it does not mean. Now it is clear that damage must be shown, for the jury are to "give such damages as they think proportioned to the injury." It has been held that these damages are not to be given as a *solatium*; but are to be given in reference to a pecuniary loss. That was so decided for the first time *in banc* in *Blake v. The Midland Railway Company*, 18 Q. B. 93; 21 L. J. Q. B. 233. That case was tried before PARKE, B., who told the jury that the LORD CHIEF BARON had frequently ruled at *nisi prius*, and without objection, that the claim for damage must be founded on pecuniary loss, actual or expected, and that mere injury to feelings could not be considered. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit



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could have been enforced by the claimants, had the deceased lived, and give damages limited thereby. If then the damages are not to be calculated on either of these principles, nothing remains except they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and in fact he had so assisted him to the value of 3s. 6d. [\* 215] a week. We do not say that it was \* necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand, a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life.

We think therefore the action maintainable. But as on any view the damages were excessive, there must be a new trial unless the parties can agree to abate them. *Rule accordingly.*

#### ENGLISH NOTES.

In *Armsworth v. South Eastern Railway Company* (1847), 11 Jur. 758, it was held by Baron PARKE that the measure of damages under the Act was the sum that the deceased would have been entitled to if he had been alive and suing, but not the value of his existence to his relatives.

Shocks to feelings caused by the death are not to be considered in estimating damages under the Act. *Gilliard v. Lancashire and Yorkshire Railway Company* (1848), 12 L. T. (O. S.) 36, per Baron POLLOCK. The same judge in *Blake v. Midland Railway Company* (1852), 18 Q. B. 93, 21 L. J. Q. B. 237, said "In assessing damages, the jury could not take into consideration the mental suffering of the plaintiff for the loss of her husband, and that as damages (awarded by the jury) exceeded any loss sustained by her admitting of a pecuniary value, this must be considered excessive."

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The principle underlying the ruling case was adopted in the earlier case of *Brammell v. Lees* (1857), 29 L. T. (O. S.) 111. There a chemist by mistake administered laudanum for tincture of rhubarb to a child twelve years old, which caused its death. The child earned nothing and was a burden to its parents. It was held that no damages could be recovered. Similar decisions were given in *Bourke v. Cork and Macroom Railway Company* (1879), 4 L. R., Ir. 682; *Holleran v. Bagnell* (1880), 6 L. R., Ir. 333.

The principal case was approved in *Dalton v. South Eastern Railway Company* (1858), 4 C. B. (N. S.) 296, 27 L. J. C. P. 227, 4 Jur. N. S. 711. It was there decided that funeral and mourning expenses could not be included in the damages.

In *Duckworth v. Johnson* (1859), 4 H. & N. 653, 29 L. J. Ex. 25, the deceased, aged fourteen, earned four shillings a week, which was applied by the father and mother to the general support of the family. It was not proved that this sum exceeded the cost of the child's maintenance. The jury awarded £20 damages. The Court refused to disturb the verdict. It was laid down that the Act does not allow of nominal damages. The decision would have been different had it been proved that the service rendered by the deceased was of less value than the cost of his maintenance. *Hull v. Great Northern Railway of Ireland* (1892), 26 L. R., Ir. 289.

In *Pym v. Great Northern Railway Company* (Ex. Ch. 1863), 4 B. & S. 396, 31 L. J. Q. B. 377, 10 Jur. N. S. 199, 11 W. R. 222, A., having an estate of £4000 a year, was killed by the negligence of the servants of the defendant company. On his death, his widow received pursuant to a settlement a jointure of £1000 a year for her life, charged on the estate: £800 a year went to the eight younger children. Subject to these charges, the estate went to the eldest son. It was held that though no loss of income was occasioned by the death, an action lay. For though the estate survived for the benefit of the family as a whole, yet the jury can look separately to the interests of each member of the family. If the death occasioned the loss to any one of them of the reasonable expectation of future advantages, such as education, &c., the jury were bound to consider such loss, and to award damages accordingly.

In *Boulter v. Webster* (1865), 11 L. T. (N. S.) 598, the Court disallowed medical expenses from the computation of damages, and it was again ruled that no action could lie under the Act for nominal damages only. BLACKBURN, J., said: "The damage (if any) must be special." Where on the other hand it was proved that the deceased was earning £4 or £5 a week, and the jury gave damages to an insignificant amount, a new trial was granted on the ground of the perversity of the verdict. *Springelt v. Balls* (1866), 7 B. & S. 477.

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In *Read v. Great Eastern Railway Company* (1868), L. R., 3 Q. B. 555, 37 L. J. Q. B. 278, 18 L. T. 82, 16 W. R. 1040, it was held that if the deceased had in his lifetime received compensation in full satisfaction of the claim for negligence, his representatives cannot recover further damages under the Act. The negligence is the cause of action, and the circumstance of the death creates no new cause of action; only the Act does away with the effect of the maxim *actio personalis moritur cum persona*. In this respect the principle is the same with that of the cases at common law where damages have been recovered for an injury, and an action is brought for further damages arising out of the same injurious Act. See *Fetter v. Beal* (1799), 1 Ld. Raym. 339; *Brunsdon v. Humphrey* (C. A. 1884), 14 Q. B. D. 141, 53 L. J. Q. B. 476, 51 L. T. 529, 32 W. R. 944. The cases arising out of a right of support are not really conflicting. They rest on the view that the cause of action is not the original excavation, but the failure from time to time to give the support which the immediate condition of things renders necessary. *Darley Main Colliery Company v. Mitchell* (1886), 11 App. Cas. 127, 55 L. J. Q. B. 529, 54 L. T. 882; *Crumbie v. Wallsend Local Board* (C. A. 1891), 1891, 1 Q. B. 503, 60 L. J. Q. B. 392, 64 L. T. 490.

The case is of course different if the release has been obtained through misrepresentations made by the defendants. *Hirschfield v. London, Brighton & South Coast Railway Company* (1876), 2 Q. B. D. 1, 46 L. J. Q. B. 1, 35 L. T. 473.

In *Rowley v. London & North Western Railway Company* (Ex. Ch. 1873), L. R., 8 Ex. 221, 42 L. J. Ex. 153, 29 L. T. 180, 21 W. R. 869, the deceased had covenanted to pay an annuity to A. during the joint lives of himself and A. In an action under the Act, the judge directed the jury in effect that they may estimate the damages to the annuitant by calculating what sum would buy him an equally good annuity. The Exchequer Chamber so far upheld the direction: but directed a *renvoi de novo* on the ground of mistakes made in the calculations directed for carrying out the principle; particularly having regard to the circumstance that the calculation was made upon the simple life instead of on the probable duration of the joint lives. They also considered that the attention of the jury ought to have been directed to the difference in value between an annuity secured on Government securities and one secured by a personal covenant.

In *Sykes v. North Eastern Railway Company* (1875), 44 L. J. C. P. 191, 32 L. T. 199, 23 W. R. 483, it was held that a father could not recover for the death of his son who was employed by him as a skilled bricklayer and was in that capacity of very great assistance to the father. — the only benefit to the father which was proved being that which was derived from this contract.

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*Hetherington v. North Eastern Railway Company* (1882), 9 Q. B. D. 160, 51 L. J. Q. B. 495, 30 W. R. 797, shows that the right of the plaintiff to receive pecuniary benefit from the deceased need not have been enforceable by law. It is sufficient, if he did actually receive the benefit.

The relatives of a deceased cannot recover damages for his death, if the deceased himself could not have recovered. For instance, if the deceased was a railway passenger, and the conditions on his ticket had exempted the railway company from liability for the accident which caused the death. *Haigh v. The Royal Mail Steam Packet Company* (C. A. 1883), 52 L. J. Q. B. 640.

In cases of death arising from collision of ships on sea, contributory negligence on the part of the deceased does not bar his relatives from recovering damages under the Act. According to the rule obtaining in cases of collision, the plaintiff was entitled to recover a moiety of the damage. *The Vera Cruz* (C. A. 1884), 9 P. D. 88, 53 L. J. P. 33, 51 L. T. 104, 32 W. R. 783.

The plaintiff cannot recover for the death of her husband if she had in his lifetime lost the legal right to support from him by living in adultery. *Stimpson v. Wood* (1888), 57 L. J. Q. B. 484, 59 L. T. 218, 36 W. R. 734.

The child for whose benefit the action is brought under Lord Campbell's Act, must be a legitimate child of the deceased. *Dickinson v. North Eastern Railway Company* (1863), 2 H. & C. 735, 33 L. J. Ex. 91.

The effect upon the damages claimed under Lord Campbell's Act of a sum of money which has been assured by contract upon the death of the deceased has been considered in several cases, of which the most important authority is the judgment of the Judicial Committee of the Privy Council in *The Grand Trunk Railway Company of Canada v. Jennings* (1888), 13 App. Cas. 800, 58 L. J. P. C. 1, 59 L. T. 679, 37 W. R. 403. It is clear from this case that it would be wrong to calculate the damages independently of the insurance money and then to deduct the insurance money. This would be fallacious, inasmuch as the person receiving the insurance is only benefited to the extent by which that sum, which would have been payable on the death at a later period, is accelerated by the immediate death. On the other hand, the acceleration of the insurance, equivalent to interest during the period of acceleration, is an element to be submitted to the jury in estimating the loss which upon the whole has been sustained by the death. If there had been an accidental death insurance the case would have been different, and in such a case the whole might be treated as a benefit, as suggested by Lord CAMPBELL in *Hicks v. Newport, &c. Railway Com-*



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*pany* (1867), 4 B. & S. 403 n. In this respect again the cause of action is essentially different from the cause of action at common law in the ordinary case of negligent damage, as appears from the next following rule.

Where an action for damages is based on contract, the deceased having died from other causes subsequent to the injury, the executrix might recover the damage to the personal estate of the deceased arising in his lifetime from medical expenses and loss occasioned by his inability to attend to his business. *Bradshaw v. Lancashire and Yorkshire Railway Company* (1875), L. R., 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. 847. This case was discussed and followed in *Leggott v. Great Northern Railway Company* (1876), 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. 334, 24 W. R. 784. *Contra*, if the action is for *tort*, death being due to the negligence. *Pulling v. Great Eastern Railway Company* (1882), 9 Q. B. D. 110, 51 L. J. Q. B. 453, 30 N. R. 798.

#### AMERICAN NOTES.

The Rule is universally supported in this country. *Chicago v. Major*, 18 Illinois, 349; 68 Am. Dec. 553; *Donaldson v. Mississippi, &c. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Kennedy v. Standard Sugar Refinery*, 125 Massachusetts, 90; 28 Am. Rep. 214; *Mansfield Coal, &c. Co. v. McEnery*, 91 Pennsylvania State, 185; 36 Am. Rep. 662; *Ohio, &c. R. Co. v. Tindall*, 13 Indiana, 366; 74 Am. Dec. 259; *Rockford, &c. R. Co. v. Delaney*, 82 Illinois, 198; 25 Am. Rep. 308; *Little Rock, &c. R. Co. v. Barker*, 33 Arkansas, 350; 34 Am. Rep. 44; *Com'rs of Howard v. Legg*, 93 Indiana, 523; 47 Am. Rep. 390; *Teifer v. Northern R. Co.*, 30 New Jersey Law, 188; *Morgan v. So. Pac. Co.*, 95 California, 510; 29 Am. St. Rep. 143; 17 Lawyers' Rep. Annotated, 71; *Fordyce v. McCants*, 51 Arkansas, 509; 4 Lawyers' Rep. Annotated, 296; *Atchison, &c. R. Co. v. Brown*, 26 Kansas, 443; *Donaldson v. Miss., &c. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Southw. R. Co. v. Paulk*, 24 Georgia, 356; *Kansas P. Ry. Co. v. Miller*, 2 Colorado, 442; *Kesler v. Smith*, 66 North Carolina, 154; *March v. Walker*, 48 Texas, 372; *James v. Christy*, 18 Missouri, 162; *Hyatt v. Adams*, 16 Michigan, 180; *Agricultural, &c. Ass'n v. State*, 71 Maryland, 86; 17 Am. St. Rep. 507, citing the principal case; *Dwyer v. Chicago, &c. R. Co.*, 84 Iowa, 479; 35 Am. St. Rep. 322; *McHugh v. Schlosser*, 159 Pennsylvania State, 480; 39 Am. St. Rep. 699; *Carlson v. Oregon, &c. Ry. Co.*, 21 Oregon, 450.

Sutherland on Damages, vol. 3, p. 282, lays down the rule: "Neither the pain nor suffering of the deceased, nor the grief nor wounded feelings of his surviving relatives, can be taken into account in the estimate of damages; 'there can be no recovery for loss of society, or wounded feelings, or anything which cannot be measured by money and satisfied by a pecuniary recompense.'"

See notes 12 Am. St. Rep. 377; 7 *ibid.* 535.

The pecuniary loss, however, has been held to embrace the loss of nurture and of the intellectual, moral and physical training which only a mother can give

No. 7. — *Franklin v. South-Eastern Railway Company.* — Notes.

to her young children. *Tilley v. Hudson R. R. Co.*, 29 New York, 252; 86 Am. Dec. 297; *Pennsylvania R. Co. v. Keller*, 67 Pennsylvania State, 300. And for the death of a wife the husband should be allowed the value of her society and companionship, estimated in a pecuniary sense, *Pennsylvania R. Co. v. Goodman*, 62 Pennsylvania State, 329; and in like manner the widow and children, for the loss of husband and father, should be allowed not only his probable earnings, but for the value of his superintendence and care of and attention to his family and the education of the children. *Baltimore, &c. R. Co. v. Wightman's Adm'r.*, 29 Grattan (Virginia), 431; 26 Am. Rep. 384; *Munro v. Pacific, &c. Co.*, 84 California, 515; 18 Am. St. Rep. 248, citing the principal case.

This liberal construction of the statute was admirably defended in the leading case of *Tilley v. Hudson R. R. Co.*, *supra*, as follows: "It is certainly possible, and not only so, but highly probable, that a mother's nurture, instruction, and training, if judiciously administered, will operate favourably upon the worldly prospects and pecuniary interests of the child. The object of such training and education is not simply to prepare them for another world, but to act well their part in this, and to promote their temporal welfare. If they acquire health, knowledge, sound bodily constitution, and ample intellectual development under the judicious training and discipline of a competent and careful mother, it is very likely to tell favourably upon their pecuniary interests. These are better even, in a pecuniary or mercenary point of view, than a feeble constitution, impaired health, intellectual ignorance and degradation, and moral turpitude. To sustain the charge, it is enough that these circumstances *might* affect their pecuniary prospects. It was left to the jury to say whether in the given case they did so or not, and if so, to what extent. It is no answer to this view to say that wealth is sometimes associated with infirm health, mental degradation, and moral turpitude. Cases of this kind do occur, but they do not make the rule, nor tend to show that the healthy growth and expansion of the physical, intellectual, and moral powers with which a kind providence has endowed us, do not tend to our worldly advantage. I do not understand from the phraseology of the statute that an extremely nice and contracted interpretation should be put upon the term 'pecuniary injuries.' A liberal scope was designedly left for the action of the jury. They are to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute as to amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care, or intellectual culture, or moral training, which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries. If the rule is a dangerous one and liable to abuse, the Legislature and not the Courts must apply the corrective. The charge is supposed to have

No. 8. — *Yates v. Whyte.* — Rule.

been particularly objectionable because it set before the jury moral training and culture as one of the sources of pecuniary benefit, which the jury were at liberty to consider. It would be an effectual though technical answer to this exception to say that the charge was not objected to specifically on that ground, and that if the charge is sustainable on the score of physical and mental training supplied by the mother, it cannot be rejected as erroneous because in the same sentence moral culture was included without a specific objection. But I think it defensible on the grounds already advanced, that moral culture, like bodily health and mental development, improves and perfects the man and fits him not only for a more useful but a more prosperous career, for worldly success as well as social consideration. It is not essential to show that they *necessarily* result in direct pecuniary advantage; it is sufficient that they may do so; that they often do so; that it is possible and not improbable that such may be the result; and that therefore these items may be set forth and presented for the consideration and deliberation of the jury, to be disposed of as they shall deem to be just. I think the exception is not well taken if they may possibly result in pecuniary benefit and do not tend in a contrary direction. I concede these are quite general and to some extent loose and indefinite elements to enter into a safe and judicious estimate of actual pecuniary damage, but I am unable to find in the statute a restriction which shall confine it within narrower limits."

The recovery may extend to the probable lifetime of the deceased. *Chicago, &c. R. Co. v. Bayfield*, 37 Michigan, 205; *Illinois Cent. R. Co. v. Barron*, 5 Wallace (U. S. Sup. Ct.), 90; *Grotenkemper v. Harris, Adm'r.*, 25 Ohio State, 510; *Chicago, &c. R. Co. v. Shannon*, 43 Illinois, 338; *Kesler v. Smith*, 66 North Carolina, 154; *Pennsylvania R. Co. v. Keller*, 67 Pennsylvania State, 300. And in the case of a deceased minor the recovery of the parent is not confined to the minority. *North Penn. R. Co. v. Kirk*, 90 Pennsylvania State, 15; *Terry v. Jewett*, 17 Hun (New York), 395.

No. 8. — *YATES v. WHYTE.*

(1838.)

No. 9. — *BRADBURN v. GREAT WESTERN RAILWAY COMPANY.*

(1874.)

## RULE.

IN an action for injuries caused by defendant's negligence, the defendant is not entitled to reduce the damages to be paid by him, by a sum paid to plaintiff by insurers in respect of the same cause of damage.

No. 8. — *Yates v. Whyte*, 4 Bing. N. C. 272, 273.**Yates v. Whyte.**

4 Bingham, N. C. 272-285 (s. c. 5 Scott, 640).

*Collision by Negligence. — Measure of Damages. — Insurance.*

Plaintiff sued defendants for damaging his ship by collision. *Held*, [272] that defendants were not entitled to deduct from the amount of damages to be paid by them, a sum of money paid to plaintiff by insurers in respect of such damage.

This was an action on the case, brought to recover damages sustained by the plaintiff by reason of the defendants' vessel, the *Gazelle*, having run foul of the plaintiff's vessel the *Sesostris*, by and through the carelessness, negligence, misdirection, and mismanagement of the defendants, whereby the plaintiff's ship sustained damage, and was obliged to put into Portsmouth to repair.

The plaintiff sought to recover £293 14s., the amount of the repairs, and also damages, on account of the detention of the *Sesostris* at Portsmouth.

At the trial before TINDAL, C. J., in 1836, the jury, as to the repairs, found a verdict for the plaintiff, but negatived his claim to damages for the detention. It was agreed that the amount of damages for repairs should be referred: and accordingly, by an order of *nisi prius*, the same was referred to the award of a London merchant, who was empowered to ascertain the same (the plaintiff undertaking to make no claim for damages arising from the detention of his vessel at Portsmouth); and for the amount of damages so to be ascertained, the verdict was to stand. And it was further ordered, that if the arbitrator should make any allowance or deduction to the defendants, from the expenses incurred by the plaintiff, in effecting the said repairs, by reason or in consequence of any payment having been made to the plaintiff by any underwriter or insurance company, the arbitrator should state the fact of his having done so upon the face of his award for the opinion of the Court as to the propriety thereof.

The arbitrator having taken upon himself the burthen

\* of the arbitration, the following admission was entered [\* 273] into by the attorneys of the respective parties: "that the work done, and materials supplied, and the items of expense mentioned in the statement of general and particular average, amounting to £293 14s., were necessarily done, supplied, and incurred, to



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repair the damage sustained by the plaintiff's ship *Sesostris*, by the collision of the schooner *Gazelle*, as in the pleadings mentioned, save and except the several sums of £5 5s. and £3 12s. mentioned in such statement under the head 'Owners;' that the plaintiff, after the commencement of this action, received from the underwriters, under a policy of insurance upon the plaintiff's ship *Sesostris* for the voyage in question, valued therein at £5000, on and in respect of the said damage, £172 4s. 11d., being the particular average on the said ship, according to the said statement, after the deduction thereon made of £71 3s. 1d., as is usual, for new materials employed in the repairs of the said ship instead of those destroyed or injured by the said collision; that the plaintiff also received from the consignors or consignees of the said cargo the further sum of £45 1s. in respect of the said damage, being the general average payable by the said consignors or consignees in respect of their goods on board the said ship; that this action was brought by the orders and instructions of the plaintiff;" that the plaintiff paid the said sum of £5 5s. for towing the said ship *Sesostris* on the 10th of January, 1834, from Portsmouth harbour to Spithead after the repairs were completed; and the said sum of £3 12s. for part of the pilotage and other charges mentioned in the particulars thereto annexed, and not allowed in the said statement.

In December 1836, the arbitrator made his award, the material part of which was as follows: —

[\* 274] \* "First, having inquired into the damages so referred to me, and excluding any claim for any damages arising from the detention of the plaintiff's vessel at Portsmouth (no claim for such damages having been made by the plaintiff), I have ascertained, and do hereby ascertain, the same at 1s.; and I award, order, and determine that the amount of damages upon the verdict already entered up for the plaintiff be reduced to the said sum of 1s. And I further award and determine that, in so ascertaining the damages, I have made an allowance to the defendants of the sum of £172 4s. 11d. from the expenses incurred by the plaintiff in effecting the repairs of his vessel, the *Sesostris*, in the pleadings mentioned, by reason of the said last sum having been paid to the plaintiff for the said repairs by the underwriters, under a policy of insurance effected by the plaintiff upon the said vessel, the *Sesostris*. And I find that the said sum of £172 4s. 11d. was paid by the said underwriters to the plaintiff after the commencement of

this action, and before the plea of the defendants was pleaded. And in case the Court of Common Pleas shall be of opinion that I have improperly allowed to the defendants the sum of £172 4s. 11d., then I do hereby fix and ascertain the damages sustained by the plaintiff, and so referred to me as aforesaid, at the said sum of £172 4s. 11d.; and I do award and determine that the damages upon the verdict so entered up as aforesaid be reduced to the said sum of £172 4s. 11d."

The arbitrator also found that the plaintiff paid the sum of £258 15s. as the premium for the said insurance; and that the only loss which accrued on the voyage was the loss occasioned by the collision aforesaid:

That this action was commenced and carried on by the orders and instructions of the plaintiff, and for \* his own [\*275] use and benefit, and was not commenced or carried on by the authority or instructions of the underwriters.

No other evidence than that above stated was laid before the arbitrator.

The question for the opinion of the Court was, whether the allowance made by the arbitrator to the defendants, by reason of the payment made to the plaintiff by the underwriters, was a proper allowance.

WILDE, Serjt., for the plaintiff. The arbitrator had no right to deduct from the damages sustained by the plaintiff, the sum paid by the underwriters. This is not a case between two wrong-doers; and there is no privity between the defendants and the underwriters: the plaintiff's contract with the underwriters is *res inter alios acta*, of which the defendants cannot avail themselves. They could not call on the underwriters to indemnify the plaintiff, in order to induce him to renounce his action against the defendants; while, on the other hand, if the plaintiff recovered against the defendants, he would hold the sum recovered as trustee for the underwriters, since all he can claim against them is indemnity for actual loss. *Randall v. Cockran*, Park. Ins. 226; 1 Ves. sen. 98; *Godsall v. Boldero*, 9 East, 71; *Case v. Davidson*, 5 M. & S. 79, 1 R. C. 141; *Irving v. Richardson*, 2 B. & Adol. 193. But a wrong-doer has no equities; and if the plaintiff had received the amount of the damages from the underwriters, he could not be trustee for the defendants, who are wrong-doers. There are cases in which a party may sometimes derive from a transaction more

than the party he has contracted with engaged to pay; but [\* 276] that would be no answer to an action on the \* contract, unless the party sued were contributory to the gain. *Bell v. Puller*, 2 Taunt. 285 (11 R. R. 574); *Street v. Blay*, 2 B. & Adol. 456. The principle is expressly laid down by Lord ELLENBOROUGH in *Cullen v. Butler*, 5 M. & S. 466 (17 R. R. 400); "It is no objection to the plaintiff's right to recover against the underwriters in this case, that he may have also a right to recover against the persons by whose immediate act the damage was occasioned." If the right to recover against the wrong-doer is no answer to an action against the underwriter, *à fortiori*, it is not affected by a payment from the underwriter. Great inconvenience would ensue upon the adoption of a different principle. Suppose the case of an action against the sheriff for an escape; or against an attorney for negligence in preparing a deed:—In *Hunter v. King*, 4 B. & Ald. 209; where the defendant, an attorney, was sued for such negligence in preparing a deed of annuity, Pike, the person who appeared to be the grantor, was held a competent witness to prove that his name had been forged; and in answer to the objection that he was an interested witness, because Hunter could not sue him after recovering against King, ABBOTT, C. J., said, "If Hunter brought an action against Pike, the latter could not, by plea, avail himself of this verdict, because it is *res inter alios acta*; and if it could not be pleaded in bar, it would not be admissible in evidence in such an action. In actions against the sheriff for an escape upon mesne process, sometimes the whole debt is recovered against the sheriff; yet, in an action against the original debtor for the debt, he could not plead in bar, or give in evidence in reduction of damages, the judgment obtained in an action against the sheriff."

The only case that seems to have any leaning towards [\* 277] \*the proposition sought to be established by the defendants, is *Bird v. Randal*, 3 Burr. 1345. There, a servant had entered into articles to serve his master for a certain time under a penalty, and the servant having left his service before the time, by the procurement of the defendant, it was held, in an action by the master to recover damages against the seducer, that the master's having sued the servant, and recovered the penalty against him, before the action brought against the seducer (though in fact the penalty recovered was not received till after the second action commenced, but before trial), was a bar to such

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further remedy ; the Court considering the amount of the penalty as ample compensation for the injury received ; and that no further satisfaction could be received from any other quarter. But Lord ELLENBOROUGH (in *Godsall v. Boldero*), said, " I never could entirely comprehend the ground on which that case proceeded. It was assumed that the sum taken as the penalty from the servant, was the extreme limit of the injury sustained by the master ; but there is the doubt ; for the penalty might have been so limited, because of the inability of the servant to undertake to pay more ; and yet it might have been very far from an adequate compensation to the master, for the injury done to him by another, who seduced his servant from him." And LAWRENCE, J., said, " I suppose the Court proceeded upon the ground that the penalty was, by the express stipulation of the parties, made an equivalent for the loss of the service." Lord ELLENBOROUGH, " That is so as between the parties themselves ; but it may admit of doubt, whether that were the fair way of considering it as against a stranger, a wrong-doer."

\* Sir W. Follett, for the defendants. The arbitrator was [\*278] right in deducting from the damage to be recovered by the plaintiff, the amount he had received from the underwriters.

There is no express decision on the point ; but, according to every analogy, the question in such a case is, not what is the extent of the defendant's liability, or the nature of his answer to the action, but what are the damages actually sustained by the plaintiff.

Although juries sometimes give more, the true measure of damages is the injury actually done. The amount of injury done to the plaintiff's ship was £172 4s. 11*d.* The underwriters have paid him that sum since this action was commenced, and if the plaintiff is allowed to recover the same amount against the defendants, he recovers twice for the same injury. On the other hand, notwithstanding the want of privity, the underwriters, after they have paid the plaintiff, may recover the amount from the defendants. They have sustained an injury by the act of the defendants ; they must have a legal remedy for that injury ; and the most direct and obvious remedy is an action by them against the defendants. It is true, the plaintiff may sue either the underwriters or the defendants ; or he may sue both ; but he cannot receive damages twice. There is no real distinction between the plaintiff's



right to sue the underwriters and the defendants, either or both of them, and the ordinary case of an execution against two or more wrong-doers: the party who levies his damages on one of them cannot levy a second time on the other. Suppose an action against an attorney for negligence in a suit to recover a debt; if the debtor paid the plaintiff, would not that go in reduction of damages? So, in the case of an action against the sheriff for an escape; if the debtor paid the amount due, could the plaintiff recover [\* 279] more than \*nominal damages? Here the underwriters have paid the whole amount of the injury. [BOSANQUET, J., in *Mason v. Sainsbury*, Marshall on Ins. 796; 3 Dougl. 60, the plaintiff, whose property had been burnt by a mob, recovered the amount of his loss from an insurance office, and was then allowed to sue the hundred on the stat. 1 G. I. s. 2, c. 5., for the benefit of the insurers.] That case, as appears from *Clark v. Hundred of Blything*, 2 B. & C. 254, turned entirely on the peculiar object of the stat. 1 G. I., to make the hundred vigilant, an object which would be defeated if the hundred were discharged by the payments of an insurance office. [TINDAL, C. J. Suppose a person out of charity reimbursed the plaintiff the amount of his loss, could the defendants, as wrongdoers, take advantage of such a payment?] In *Godsall v. Boldero*, Mr. Pitt's debt having been paid by the nation, in the way of charity, it was held that the creditor could not recover the amount a second time from the office where he had insured it. And for this purpose, there is no substantial distinction between cases of contract and cases of tort. If the party who guarantees a debt chooses to pay it, the creditor cannot afterwards recover the amount from the principal debtor; and what were the insurers here, but parties who guaranteed the plaintiff against a loss? In the case of a bill of exchange with several indorsers, the holder may sue all, but can receive the amount only once. In *Bell v. Puller*, the plaintiff performed his contract with the defendants to go to St. Petersburg and back: his being entitled to a sum in the nature of liquidated damages for the defendant's omission to find a return cargo, was no reason why, consistently with the performance of his contract, he should not employ his ship in any way conducive to his own ad- [\* 280] vantage; and with the profits of that \*employment the defendants could have no right to interfere. But in *Stanforth v. Lyall*, 7 Bing. 169, the defendants chartered a ship to

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New Zealand, where they were to load her, or by an agent there to give plaintiff, the owner, notice that they abandoned the adventure; in which case they were to pay him £500. The ship went to New Zealand, but found neither agent nor cargo there, and the captain made a circuitous voyage home, by way of Batavia. That voyage, after making every allowance for increased expense and loss of time, was more profitable than the adventure to New Zealand would have been. The plaintiff having sued the defendant on the charter-party for breach of covenant, it was held, that he could not recover the £500 penalty, in addition to the profit of the homeward voyage. In that case there was no privity of contract between the defendant and the persons who had furnished the homeward cargo; and if the underwriters are entitled to the benefit of the plaintiff's action, at least it should appear that the plaintiff sues for them: the Court cannot take into consideration any equitable interest that a third person may possibly have. In *Godsall v. Boldero*, when the counsel for the defendants argued, that in no case can an assured recover double satisfaction, whether from the same or any other person, and that, therefore, it was immaterial from whom the first satisfaction came, and cited *Bird v. Randal*, Lord ELLENBOROUGH doubted that case, because it seemed to have been erroneously assumed that the sum taken as a penalty from the servant was necessarily the amount of the damage sustained; admitting thereby, that, if the assumption had been correct, the plaintiff could have recovered no more: here, the actual amount of damage is indisputably that which has been paid by the underwriters: *Bird v. Randal*, \* therefore, is [\* 281] a distinct authority that where an action lies on a contract for a penalty, and also against a separate tortfeasor for the injury in respect of which the penalty is to accrue, the plaintiff cannot recover more than once; and so in the case of several tortfeasors: as if master and servant be sued separately for the wrongful act of the servant; if the servant pay, the plaintiff cannot recover against the master; and *vice versâ*, if the master pay, the damages cannot be levied on the servant. If then, this be the action of the owner of the ship, he has received the amount of his damage already; and if it be the action of the underwriters in his name, the Court cannot take into its consideration that the underwriters may file a bill in equity against the plaintiff in case he should recover. [VAUGHAN, J. Do you say that the defendants are to

go scot free, and have the benefit of an insurance without paying the premium? PARK, J. Suppose a poor man is beaten and incurs a surgeon's bill, which is paid for him by some charitable person, could he not recover against the assailant? He could not recover the surgeon's bill, for he has neither paid it nor continues liable to pay it; and as to the defendants going scot free, there are some cases in which that may occur; actions are not brought to punish wrong-doers, but to satisfy the injured party for the damages he has sustained; and a wrong may be committed, unattended with damage. *Marzetti v. Williams*, 1 B. & Adol. 415; 3 R. C. 746. If the plaintiff recovers his damage from one against whom he has a legal claim, he cannot recover it a second time, even from a party against whom he might have had a concurrent claim. The underwriters have a claim against the defendants, for the underwriters' remedy ought not to be dependent on the will of the plaintiff; but the plaintiff, having received the full amount of his damage, is no longer in a position to recover it against the defendants.

[\*282] \*Wilde, in reply. This action will enure for the benefit of those who by law are entitled to recover: for the benefit of the underwriters if they be entitled to salvage; for the benefit of the plaintiff if he has not been indemnified by the underwriters. It is true that none can recover compensation twice in respect of the same injury; but what the plaintiff recovers under the policy is not a compensation for damages, but a payment under a contract independent of the injury. The principle which excludes double compensation does not apply to obligations not in the same right. In the case of an action against an attorney for negligence in suing for a debt, a payment by the debtor would be a payment in respect of the same right, and would go in diminution of the plaintiff's loss; but in an action against a debtor for the non-payment of an annuity, the defendant could not set off damages recovered by the plaintiff against the attorney for taking insufficient securities.

TINDAL, C. J. I think this case is decided in principle by that of *Mason v. Sainsbury*. There, a party whose property had been burnt by a mob was allowed, after receiving the amount of his loss from an insurance office, to sue the hundred on the statute 1 G. I. for the benefit of the insurers. The only distinction between that case and the present, is, that there the action for the wrong was brought at the instance of the insurance office, which is not the case here. But it establishes that a recovery upon a contract with

the insurers is no bar to a claim for damages against the wrong-doer. Lord MANSFIELD says, "Though the office paid without suit, this must be considered as without prejudice; and it is, to all intents, as if it had never been paid. The question comes to this: Can the owner of the house, having insured it, come against the hundred under this act? Who is first liable? If the hundred be \* first liable, still it makes no difference. If the [\* 283] insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an indemnity. We every day see the insured put in the place of the insurer. In abandonment it is so; and the insurer uses the name of the insured. It is an extremely clear case. The act puts the hundred in the place of the trespassers; and on principles of policy, I am satisfied it is to be considered, as if the insurers had not paid a farthing." That the insurers may recover in the name of the assured after he has been satisfied, appears from *Randal v. Cockran*, where it was held that they had the plainest equity to institute such a suit. Such therefore is the situation of the underwriters here, that this case has received its answer from it. If the plaintiff cannot recover, the wrong-doer pays nothing, and takes all the benefit of a policy of insurance without paying the premium. Our judgment must be for the plaintiff.

PARK, J. I am of the same opinion. This point has been decided ever since the time of Lord HARDWICKE; so much so that it has been laid down in text-writers, that where the assured, who has been indemnified for a wrong, recovers from the wrong-doer, the insurers may recover the amount from the assured. In *Randal v. Cockran* it was said they had the clearest equity to use the name of the assured, in order to reimburse themselves, and in *Mason v. Sainsbury* the Judges were all unanimous: they held indeed that the insurers could not sue in their own names; but they confirmed the general doctrine, that the wrong-doer should be ultimately liable, notwithstanding a payment by the insurers.

VAUGHAN, J. No case has been cited which establishes the point contended for on behalf of the \* defendants, [\* 284] while *Randal v. Cockran*, and *Mason v. Sainsbury*, are in point for the plaintiff.

In *Mason v. Sainsbury*, it was argued as here, that the plaintiff, having received his indemnity from the insurers, could not recover



a second time against the hundred; but Lord MANSFIELD said, "Who is first liable? If the hundred be first liable, still it makes no difference: if the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an indemnity. We every day see the insured put in the place of the insurer." And in *Clark v. The Hundred of Blything*, the authority of *Mason v. Sainsbury* was expressly recognised by Lord TENTERDEN.

BOSANQUET, J. I am of the same opinion, and consider the case as decided by *Mason v. Sainsbury* in 1782. It is true that in *Clark v. The Hundred of Blything*, Lord TENTERDEN made observations on the object of the statute of 1 G. I.; but there was nothing in those observations to impeach the case of *Mason v. Sainsbury*, where BULLER, J., said, "Whether this case be considered on strict or on liberal principles of insurance law, the plaintiff must recover. Strictly, no notice can be taken of any thing out of the record. The contract with the office, strictly taken, is a wager; liberally, it is an indemnity: but on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted, that the hundred is put in the place of the trespassers. How could the trespassers have availed themselves of this satisfaction, made by the office? Could they have pleaded it by way of accord and satisfaction? It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the [\* 285] \* principle is, that the insurer and insured are as one person; and in that light, the paying before, or after, can make no difference." There, the action was brought for the benefit of the underwriters; here, the plaintiff sues on his own account. But I think that makes no difference; for he has the legal right to the damages, and if the underwriters have an equitable right they will establish it in another Court.

*Judgment for plaintiff.*

No. 9. — *Bradburn v. Great Western Railway Company*, L. R., 10 Ex. 1, 2.**Bradburn v. Great Western Railway Company.**

L. R., 10 Ex. 1-3 (s. c. 44 L. J. Ex. 9; 31 L. T. 464; 23 W. R. 48).

*Negligence. — Insurance. — Damages.*

In an action for injuries caused by defendants' negligence, a sum received [1] by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages.

Action brought to recover damages for injuries sustained by the plaintiff through the defendants' negligence, while he was travelling as a passenger on their line. The cause was tried at Stafford, before PIGOTT, B., at the last Summer Assizes. The jury found a verdict for the plaintiff for £217; but, as it appeared that he had received a sum of £31 on account of the accident upon an insurance effected by him with the Accidental Insurance Company, it was contended by the defendants that that sum ought to be deducted from the sum at which the jury assessed the damages. The learned Judge, after consulting with Lord COLERIDGE, C. J., directed the verdict to be entered for the whole sum, but reserved leave to the defendants to move to reduce the verdict by £31.

Huddleston, Q. C., moved accordingly. The plaintiff's loss [\*2] from the accident was partly compensated by what he received from the insurance company by reason of the accident. The case of *Yates v. Whyte*, 4 Bing. N. C. 272, p. 429, *ante*, is distinguishable on the ground that the policy there was strictly a contract of indemnity, and the plaintiff was to hold the proceeds of the action in trust for the underwriters so far as they had indemnified him.<sup>1</sup> The direction of Lord CAMPBELL, C. J., to the jury in *Hicks v. Newport, &c. Ry. Co.*, 4 B. & S. 403, note to *Pym v. Great Northern Ry. Co.*, in an action brought under 9 & 10 Vict. c. 93, is more applicable; there the whole sum received on an accident policy was deducted.

BRAMWELL, B. Clearly there must be no rule. The jury have found that the plaintiff has sustained damages through the defendants' negligence to the amount of £217, but it is said that because

<sup>1</sup> In *Yates v. Whyte*, p. 429, *ante* (4 Bing. N. C. at p. 285), BOSANQUET, J., after referring to the similar case of *Mason v. Sainsbury* (3 Doug. 60), says, "There the action was brought for the benefit of the underwriters; here the plaintiff sues on

his own account. But I think that makes no difference; for he has the legal right to the damages, and if the underwriters have an equitable right, they will establish it in another Court."

the plaintiff has received £31 from the office in which he insured himself against accidents, therefore the damages do not amount to £217. One is dismayed at this proposition. In *Dalby v. India and London Life Assurance Company*, 15 C. B. 365; 24 L. J. C. P. 2, it was decided that one who pays premiums for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a *quid pro quo*, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shows that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendants' negligence.

As to the case of *Hicks v. Newport, &c. Ry. Co.*, that was an action brought under Lord CAMPBELL'S Act, and the ruling is quite correct. The statute had laid down no rule as to the mode [\* 3] of \*calculating the damages to be given in respect of the right of action which it created. The rule was first laid down in this Court (*Franklin v. South Eastern Ry. Co.*, p. 419, *ante*, 3 H. & N. 211, followed in *Dalton v. South Eastern Ry. Co.*, 4 C. B. (N. S.) 296; 27 L. J. C. P. 227, and *Pym v. Great Northern Ry. Co.*, 4 B. & S. 396; 32 L. J. Q. B. 377), and that rule was, that the damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and similarly, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account. But that has no bearing on the case of a person suing upon his common-law right for injuries caused to him by the defendants' negligence.

PIGOTT, B. I am of the same opinion. The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident

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must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.

AMPHLETT, B., concurred.

*Rule refused.*

## ENGLISH NOTES.

The rule in the principal case of *Yates v. Whyte* was affirmed by the House of Lords in *Simpson v. Thomson* (1878), 3 App. Cas. at p. 285, to be presently referred to.

On a somewhat similar principle, was decided the case of *Jebson v. East and West India Dock Company* (1875), L. R., 10 C. P. 300, 44 L. J. C. P. 181, 32 L. T. 321, 23 W. R. 624. The plaintiffs, twelve in number, were the owners of a ship called the *J*. The defendants' negligence prevented her from fulfilling a contract to carry two hundred and forty emigrants from X. to Y. The defendants were aware of the contract. Five of the plaintiffs carried two hundred and two of these emigrants to Y. in another ship of theirs, and twenty-five of the emigrants were carried in another ship belonging to other five of the plaintiffs. It was held that damages for the negligence of the defendants could not be reduced on account of these circumstances.

When the object partially insured is injured or destroyed by the negligence of another person, the assured may bring an action against that person for the full amount of damages without the interference of the insurers; but he will be subject to liability for anything done by him in violation of any equitable duty towards the insurers. *Commercial Union Assurance Company v. Lister* (1874), L. R., 9 Ch. 483, 43 L. J. Ch. 601.

By custom in the grain trade of London, the wharfinger is liable to the merchant for any loss by fire of grain stowed in his granaries. The merchant and the wharfinger both insured a quantity of grain. It was held that the merchant's insurers could not be called upon to contribute to the wharfinger's insurers in respect of any loss by fire, but that the merchant's insurers can call upon the wharfinger's insurers or the wharfinger himself to recoup them the amount paid to the merchant. *The North British & Mercantile Insurance Company v. The London, Liverpool, & Globe Insurance Company* (C. A. 1877), 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. 629. This case was followed in *Darrell v. Tibbitts* (C. A. 1878), 5 Q. B. D. 560, 50 L. J. Q. B. 33, 42 L. T. 797, 29 W. R. 66, where, the insured having received the insurance money as well as a sum by way of compensation from another source, the two sums amounting to more than his actual loss, the insurer was held entitled to recover the excess. But the insurer cannot recover from the assured a sum of money received by him as compensa-



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tion for actual loss not covered by the insurance. *Burnand v. Rodocanachi* (II. L. 1882), 7 App. Cas. 333, 51 L. J. Q. B. 548. This was a case where compensation money received by the United States Government under the Geneva Arbitration was distributed under an Act of Congress which expressly excluded insurers from the benefit of the distribution. The defendants (respondents) had insured a cargo of tobacco upon a valued policy with the plaintiffs (underwriters). The plaintiffs had paid as on a total loss, and the defendants subsequently received in the above distribution a sum in respect of their loss. The defendants claimed to have this paid over to them. The House of Lords, affirming the judgment of a majority of the Court of Appeal, held that the defendants were not estopped as against the plaintiffs from saying that their loss was not covered by the insurance, and that the money paid by the U. S. Gov't must be presumed not to have been paid in respect of the loss so covered; and they accordingly decided against the plaintiff's claim. It was intimated that if the payment made by the Government had been paid in respect of the losses covered by the insurance, the plaintiffs would have been entitled to recover, on the principle of *Randall v. Cockran*, 1 Ves. Sen. 98; *Blauwripot v. Da Costa*, 1 Eden, 130; and *Gracie v. New York Ins. Co.*, 8 Johns. N. Y. Rep. 183.

In *Castellan v. Preston* (1883), 11 Q. B. D. 380, the insurers were held entitled to the purchase moneys of the house insured and burnt down, and paid by the purchaser.

The insurers stand in no better position than the assured. Hence if the insured could not recover damages from a wrong-doer, the insurers cannot. For instance, where two ships belonging to the insured collided, the underwriters were not entitled to recover from the owner. *Simpson v. Thomson* (1878), 3 App. Cas. 279, 38 L. T. 1.

## AMERICAN NOTES.

The Rule correctly states the doctrine accepted in this country. *Yates v. Whyte* is cited to this effect in 1 Sutherland on Damages, p. 243, and is supported by *Wiber v. Morris, &c. R. Co.*, 36 New Jersey Law, 213; 10 Am. Rep. 253; citing *Yates v. Whyte*; *Harding v. Townshend*, 43 Vermont, 536; 5 Am. Rep. 304; citing *Yates v. Whyte*; *Carpenter v. Eastern Trans. Co.*, 71 New York, 574; *Pierrott v. Shearer*, 17 Michigan, 48; *Hayward v. Cain*, 105 Massachusetts, 213; *Sherlock v. Alling*, 44 Indiana, 184; *Cunningham v. Evansville R. Co.*, 102 Indiana, 478; 52 Am. Rep. 683; *Clark v. Wilson*, 103 Massachusetts, 219; 4 Am. Rep. 532, citing *Yates v. Whyte* (a learned review); *Connecticut L. Ins. Co. v. New York, &c. R. Co.*, 25 Connecticut, 265; *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Maine, 253; *Hall v. Railroad Co.'s*, 13 Wallace (U. S. Sup. Ct.), 367, citing *Yates v. Whyte*; *Dillon v. Hunt*, 105 Missouri, 154; 24 Am. St. Rep. 374; *Pittsburgh, &c. R. Co. v. Thompson*, 56 Illinois, 138.

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In *Sherlock v. Allen*, *supra*, the Court denied to the defendants any advantage from "pecuniary benefits received by the injured party, to which the defendants had not contributed, and not resulting from or connected with the act causing the death, — benefits which it is fair to presume would have been realized at a future day, without the aid of their wrongful act. To allow such a defence would defeat actions under the law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children, and the wrong-doer would thus be enabled to protect himself against the consequences of his own wrongful act." Insurance contracts "are matters in which the appellee, as the wrong-doer, had no concern, and which do not affect the measure of its liability." *Cunningham v. Evansville, &c. R. Co.*, *supra*.

Where the plaintiff is a physician, the fact that it is the universal custom of physicians to attend upon each other, in case of sickness or injury, free of charge, is immaterial. *City of Indianapolis v. Gaston*, 58 Indiana, 224.

Although the salary of the plaintiff was continued by his employer during the time of his disability, this does not mitigate the damages. *Ohio, &c. Ry. Co. v. Dickerson*, 59 Indiana, 317, the Court observing: "In such cases damages are assessed according to uniform principles, and are not to be affected by the mere accidental business relations of the party injured. The liberality of his employer forms no reason why the appellee should not be compensated for the injury he sustained."

But where exemplary damages are improper, and evidence of loss of wages has been given, evidence may be given that the plaintiff's employer continued his wages while he was disabled, distinguishing *Yates v. Whyte, Drinkwater v. Dinsmore*, 80 New York, 390.

So a married woman cannot recover for physicians' and nurses' bills, because she is not liable for them. *Moody v. Osgood*, 50 Barbour (New York Supreme Court), 628.

So in an action of damages for death, the recovery may not be reduced by the amount of a life insurance received by the plaintiff. "The party effecting the insurance paid the full value of it, and there is no equity in the claim of the defendant to the benefit of a contract for which it gave no consideration." Alluding to Lord CAMPBELL's supposed opinion to the contrary: "In this country the Courts have uniformly held the contrary, and this view is the more just and reasonable. *Althorf v. Wolfe*, 22 New York, 355; *Harding v. Town of Townshend*, 43 Vermont, 536; 5 Am. Rep. 304; *Pittsburgh & Cin. R. Co. v. Thompson*, 56 Illinois, 138;" and citing both principal cases; *Baltimore & Ohio R. Co. v. Wightman's Admr.*, 29 Grattan (Virginia), 431; 26 Am. Rep. 384. In the last case the Court said: "The mere fact that the family of the deceased received money from some other source would not justly influence the measure of compensation to be made by the defendant for injuries attributable to the misconduct of its employees and agents. The party effecting the insurance paid the full value for it, and there is no equity in the claim of a defendant to the benefit of a contract for which it gave no consideration."

In *San Antonio, &c. R. Co. v. Long*, 87 Texas, 148; 24 Lawyers' Rep.

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**No. 10. — Knight v. Egerton. — Rule.**


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Annotated, 637, it was held however that where the statute gives damage only for pecuniary loss, in case of death from wrongful act, and allows a recovery to each relative separately, there can be no recovery by one who receives more property in value from the estate of the decedent than the prospective benefits that would have accrued to him if the death had not occurred. The Court cited *Bradburn v. Great W. Ry. Co.*, and *Grand Trunk R. Co. v. Jennings*, 13 App. Cas. 800, and observed: "But neither the expressions in the case last cited, nor in *Bradburn v. Great Western Co.*, *supra*, are authoritative. The Court of the Exchequer took substantially the same view of the question, as is shown by the case of *Pym v. Great Northern R. Co.*, *supra*. On the other hand there are several decisions which hold that proof that a beneficiary has received money from a policy of insurance on the life of the deceased cannot be received for the purpose of reducing the damages." Citing cases above, and *Carroll v. Mo. Pac. R. Co.*, 88 Missouri, 239; 57 Am. Rep. 382; *Western & A. R. Co. v. Meigs*, 74 Georgia, 857. The decision is put on the peculiar form of the statute, and the *Barron* case is distinguished.

*Futes v. Whyte* is cited in 1 Sutherland on Damages, p. 243, and the *Bradburn* case in *ibid.*, vol. 3, p. 269.

### SECTION III. — *Assessment of Damages.*

#### **No. 10. — KNIGHT v. EGERTON.**

(1852.)

#### **No. 11. — PHILLIPS v. LONDON & SOUTH WESTERN RAILWAY COMPANY.**

(C. A. 1879.)

#### **RULE.**

DAMAGES are assessed by the jury under the direction of the Judge. Where the Judge does not direct the jury as to the measure of damages, or where the damages awarded are so excessive or so inadequate as to show that the jury-men did not properly exercise their judicial discretion, a new trial will be granted.

## No. 10. — Knight v. Egerton, 7 Exch. 407, 408.

**Knight v. Egerton and others.**

7 Exch. 407-409.

*Measure of Damages. — Discretion of Jury. — New Trial.*

In case for selling goods distrained for rent without appraisement, the [407] measure of damages is the real value of the goods sold, minus the rent due.

If a judge at *nisi prius* does not inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the Court will direct a new trial, although the point was not taken by the plaintiff's counsel at the trial.

Case — The declaration contained six counts: first, for distraining the plaintiffs' goods for an alleged arrear of rent due to the defendants (who were the plaintiffs' landlords of a farm in the county of Chester), a less amount of rent being in fact due; secondly, for an excessive distress; thirdly, for selling the goods distrained without having duly appraised the same; fourthly, for distraining beasts of the plough, there being, without them, a sufficient distress to satisfy the rent and expenses; fifthly, for not paying over to the plaintiff the overplus, after satisfaction of the rent and the lawful expenses of the distress and sale; and, lastly, for selling for less than the best prices that might have been obtained.

The defendants pleaded to the first, fifth, and last counts, not guilty; to the second and fourth, a plea of payment into Court of £1; and to the third, a plea of payment into Court of 10s. To the latter pleas there were replications of damages ultra; on which issue was joined.

At the trial, before WIGHTMAN, J., at the last summer Assizes for Cheshire, it appeared that the rent in arrear was £144; that all the household goods and farming stock of the plaintiff, including his beasts of the plough, were distrained, the value of the former being sufficient to satisfy the rent and expenses, without the beasts of the plough; that the goods were appraised before the constable of the township, and, as was alleged on the part of the plaintiff, but not proved, that one of the sworn appraisers was one of the bailiffs who made the distress; and that the rent and expenses, amounting in all to £161, were satisfied without selling the beasts of the plough, of which the plaintiff had retained the undisturbed possession and use. It appearing that amongst the expenses of the distress there was a charge \* of £2 2s. [\* 408] which could not lawfully be made, the plaintiff had a ver-



dict for that amount on the issue on the fifth count. As to the other counts (the first having been abandoned), the learned Judge left it to the jury to say, first, whether the sale had been improperly conducted, so that the best prices had not been obtained for the goods; and secondly, whether the sums paid into Court were a sufficient compensation for any loss or inconvenience which was proved to have been sustained by the plaintiff, by the admitted irregularities in respect of which they were so paid in; and the jury found on all these issues for the defendants.

In the following Michaelmas Term,

Herbert Jones, Serjt., moved for a rule *nisi* for a new trial, on affidavits, and also on the ground of misdirection as to the issue on the third count; and PARKE, B., referring to the case of *Biggins v. Goode*, 2 C. & J. 364, observed, that the proper measure of damages on that count was the value of the goods, *minus* the rent; that the distress being lawful, but the sale without a due appraisement not so, the plaintiff retained, notwithstanding the sale, the same interest in the goods which he had while they were in the landlord's hands, before the sale, *i. e.* to the amount of the real value of the goods, subject to the landlord's right for the rent due.

Welsby, who now appeared to show cause against the rule, submitted, on the part of the defendants, that, as this point had not been taken by the plaintiffs' counsel at the trial, but only for the first time suggested from the bench when the rule was moved for, and as, in point of fact, the appraisement appeared to be perfectly regular, there ought not to be a new trial; although he [\* 409] admitted that the \* proper measure of damages was as laid down in *Biggins v. Goode*, and other cases.<sup>1</sup> But

The Court<sup>2</sup> said, that the plea of payment into Court was a conclusive admission that there was a sale without the goods having been duly appraised; and that it was the duty of the Judge to inform the jury what was the true measure of damages on that issue, whether the point was taken or not; so that the rule must be absolute for a new trial, unless the defendants' counsel agreed to increase the damages to the proper amount. *Rule absolute.*

Herbert Jones, Serjt., and Mills appeared in support of the rule.

<sup>1</sup> See *Knotts v. Curtis*, 5 Car. & P. 322, 2 Tyr. 449 n.; *Whitworth v. Maden*, 2 Car. & K. 517. <sup>2</sup> PARKE, B., ALDERSON, B., and MARTIN, B.

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No. 11. — *Phillips v. London & South Western Ry. Co.*, 5 Q. B. D. 78, 79.

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**Phillips v. London and South Western Railway Company.**

5 Q. B. D. 78-88 (s. c. 41 L. T. 121; 28 W. R. 10).

*Damages, Insufficiency of. — New Trial.*

A new trial will be granted, in an action for personal injuries sustained [78] through the defendants' negligence, where the damages found by the jury are so small as to show that they must have omitted to take into consideration some of the elements of damage.

Consideration of the directions proper to be given to a jury as to the damages to be awarded to the plaintiff for the bodily suffering arising from personal injuries, and the damages to be awarded to him for loss of professional income arising from those injuries.

This was an appeal by the defendants from a decision of the Queen's Bench Division directing a new trial (4 Q. B. D. 407). The application was made on the ground of insufficiency of damages and misdirection. The Court granted a new trial on the former ground only.

The action was brought by Dr. Phillips, a physician in Grosvenor Square, against the London and South Western Railway Company to recover damages in consequence of an alleged negligent act of their servants in bringing about a collision on the 8th of December, 1877, between a train in which Dr. Phillips was being carried to London, and a light engine which was on the same line of rail.

The case was tried before FIELD, J., and a special jury.

The learned Judge in his summing up, after stating the nature of the case, proceeded as follows: "As a matter of law the principle of damages is not very well defined, and if I may say so, I am inclined to think purposely so, because in this country, be it right or wrong, the public like to be judged by their fellow-public, and not always to have the minds of lawyers to judge between two men of ordinary life and habits. In a question of damages like this it seems to me that the law means to bring in the habits, thoughts, feelings, and general knowledge of things, which are \* brought to bear by taking twelve honest, independent [\* 79] men, chosen indifferently, and putting them into the box to consider what sum one man ought to pay to another for an injury. With regard to contracts there is no difficulty. If I contract with you to sell you so much sugar at such a price, and I do not do it,

and you are obliged to spend double the money in getting the sugar, you put down the figures, and say the damage you have sustained is so much, and that is what I must pay. If I contract with you on a bill of exchange, I must pay the amount and the interest upon it, because I have contracted to pay that. In those cases there is no difficulty whatever in the principle of damages. But when you come to questions like the present, which involve personal injury, the measure becomes more difficult. The only principle, if I may use the word, which applies to contracts is this, that you must, as a rule, give a man compensation by way of damage for the loss he has, in the ordinary and natural course of things, suffered from the breach of contract. But it has been pointed out for centuries, and it is the principle of foreign jurisprudence as well as ours, that in actions for personal injuries of this kind, as well as in many others, it is wrong to attempt to give an equivalent for the injury sustained. I do not mean to say that you must not do it, because you are the masters and are to decide; but I mean that it would operate unjustly, and in saying so I am using the language of the great Baron PARKE, whose opinion was quoted with approval in *Rowley's Case*, L. R., 8 Ex. 231, 42 L. J. Ex. 153. Perfect compensation is hardly possible, and would be unjust. You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation, once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full, fair compensation for that which he has suffered.

"Now, originally there were two questions which stood before you for decision. The plaintiff alleges that the defendants by their negligence caused this injury. There was a denial [\*80] of that. \*The facts are short, and although there is no question now for you upon it, still it is desirable that you should see how it was that the accident happened." [The learned Judge here briefly stated the circumstances.]

"Now, undoubtedly, it would have been very difficult to have contended, when all the evidence was taken, that there was not negligence on the part of the company, and the counsel for the company exercised a sound judgment in giving up the point

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The only importance of adverting to the circumstances is this, that there is nothing in them which calls for any expression on your part, by way of verdict, of any vindictive feeling, if I may use the word, against the company. It is not a case in which they grossly neglected their duties, but an accident has happened through a wrong proceeding on the part of some of their servants arising from possibly good motives, or natural motives. [The learned Judge then referred to the evidence as to the state of the plaintiff, the result of which was that there was no hope that he would ever be able to resume his profession or even recover so far as to have any enjoyment of life, and proceeded :—] Now with regard to the pecuniary position, it is this, the plaintiff has been making an income of between £6000 and £7000. You will have to consider under the head of damages, first of all, the pain and suffering to him. That of course is a matter which you must take into account, as it is a fair matter for compensation. An active, energetic, healthy man is not to be struck down almost in the prime of life, and reduced to a powerless helplessness with every enjoyment of life destroyed and with the prospect of a speedy death, without the jury being entitled to take that into account, not excessively, not immoderately, not vindictively, but with the view of giving him a fair compensation for the pain, inconvenience, and loss of enjoyment which he has sustained. Then, after you have considered what sum you think it is right to award on that ground, the next head which you have to consider is the amount of expense which he actually incurred. [The learned judge then adverted to the items of expenditure amounting to £923, the main item being a journey taken to the south of France by the advice of his medical attendants.]

“Now we come to the most difficult portion of the case and that \* is the question of the loss of income. There is [\*81] comparatively no difficulty about it up to the present time, because the plaintiff has undoubtedly already lost a considerable amount of income. But what are the principles on which you are to take the amount of income? You have had furnished to you the gross amount as to which no question at all is raised, except one to which I will draw your attention. He appears to have had a very lucrative practice, and to have received in some cases, very large fees. In one case the sum was 5000 guineas. If that had been sought to be taken into account in ascertaining the average



income, it would have been open to objection, because such a thing might happen once in a man's life, and never happen again. Therefore, very reasonably, the accountants who have gone through the figures have agreed that that fee is not to be taken into account at all, and the way they have dealt with the case is this: They have taken from the attendance book the number of times when the patient was visited, or visited the doctor, and have put down a guinea for every attendance. I do not know whether you think there is any very great reason to complain of that. It is entirely a question for you. That I think is the only question as to the amount of income with which you are to start. Now how are you to deal with the loss of future income? I first of all say that I see nothing whatever in this case to lead you to give vindictive damages. I say also that you are not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. You must take all things into consideration, and endeavour to see if you can what is the proper mode of dealing with them. An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened. That does not come into account here, and I only give it by way of illustration of what must pass through your minds for the purpose of seeing what sum is to be given. It is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the

[\*82] \*probable continuance of the plaintiff's professional income would have been.

"There is another matter which has been discussed a good deal, and it is one of considerable difficulty, viz. how far you are to take into account the plaintiff's position. In the case of a poor man, who lost his leg or arm, by which he earned his living, you would probably in considering what sum you would give him take into account that he was deprived of the power of earning a livelihood. On the other hand, my Brother Ballantine asks you to take into account that the plaintiff and his wife are in receipt of an income of something like £3500 a-year, so that he will be above all want, and will be able to live comfortably and with all the reasonable

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enjoyments of life. I must confess for myself I have very great difficulty in seeing how you can say that because a person who is injured is very well off, therefore, the person who injures him is not to pay reasonable or proper compensation. The damages to which a man is entitled are the consequences of a wrongful act by which he suffers. The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a sum of money as you think he would have been likely to earn if this accident had not happened. That has been taken from him, and I am at a loss to see how the fact that he enjoys a considerable income from other sources, can alter the amount which you ought to give him. At the same time, as all the circumstances of the case are to be under your consideration, I cannot altogether remove that fact from your view, in the same way as I tell you that you must not give the value of an annuity for the whole of the plaintiff's life, and that the law does not assume that in cases of injury to persons an equivalent is of necessity to be given."

The jury gave the plaintiff £7000. The plaintiff moved for a new trial, which was granted by the Queen's Bench Division, on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the circumstances which ought to have been taken into account. The defendants appealed.

Ballantine, Serjt., and Dugdale, for the defendants. The Court \* will not interfere with the verdict of a jury as to [\* 83] unliquidated damages where there is no certain basis of calculation, unless there has been misdirection, or the jury have miscalculated figures, or been guilty of misconduct. *Forsdike v. Stone*, L. R., 3 C. P. 607. No misconduct is alleged. There was no miscalculation of figures, for there were elements of uncertainty in the income. A professional income is not like a certain annuity, and a jury is not bound to believe that it could not fall off. There was no misdirection; the Judge could not exclude from the consideration of the jury the fact that the plaintiff and his wife had £3500 a year from property, for the fact had been proved before them, but he tells them to pay no attention to it. He was correct in telling them that they were not bound to give full compensation, that rule being settled by *Rowley v. London and North Western Ry. Co.*, L. R., 8 Ex. 221.

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[BRETT, L. J. Do you contend that if in a case of malignant slander very likely to cause heavy pecuniary loss the jury gave a farthing damages the Court could not interfere?]

If the jury had fairly considered the case the Court would not interfere, *Fulvey v. Stamford*, L. R., 10 Q. B. 54; *Kelly v. Sherlock*, L. R., 1 Q. B. 686, and so in a case of personal injury. *Armstrong v. Haley*, 4 Q. B. 917. The principle as to a Judge not interfering with a verdict because he differs from it is clearly laid down by BRETT, L. J., in *Bridges v. North London Ry. Co.*, L. R., 7 H. L. 213, 235.

Sir J. Holker, A. G., Pope, Q. C., and A. L. Smith, for the plaintiff. The Queen's Bench Division rightly held that the damages were so grossly inadequate as to show conclusively that the jury must have omitted to take into consideration some of the elements of damage. They have actually given the plaintiff nothing but bare compensation for the pecuniary loss which he has sustained up to the present time.

[The Court here stated that they did not require to hear the plaintiff's counsel on that point, and asked whether a decision on the question of misdirection was pressed for.]

The case will go to the House of Lords, and the plaintiff wishes for a decision on the question of misdirection. The accuracy [\*84] of \*the rule laid down by BRETT, L. J., in *Rowley v. London and North Western Ry. Co.*, L. R., 8 Ex. 231; 42 L. J. Ex. 153 is disputed. It no doubt is the rule that a jury must not attempt to give a man a full compensation for bodily injury; if they were to do so there would be no limit to the amount of damages, for no sum would be an equivalent for the loss of a man's eyes; but full compensation is to be made for pecuniary loss.

[BRETT, L. J. What do you say would have been the correct direction to the jury in *Rowley's Case*?]

That the jury must take into account the value of an annuity during the joint lives of the covenantor and covenantee, having regard to the mode in which it was secured and to all the circumstances of the covenantor.

[BRETT, L. J. That is not much more definite than the rule I laid down.]

It does give the jury a sufficient guide to the circumstances to be taken into consideration.

[JAMES, L. J. The proper direction to the jury, as it seems to

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me, would have been to tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth.

BRETT, L. J. Do you say that the conduct of the defendants is not to be taken into account?]

Certainly, it is not. If the defendants are in the wrong they must make compensation for the injury accruing from the wrong.

[JAMES, L. J. I think that what FIELD, J., meant to say was — so far as the injury results in actual pecuniary loss you must give the plaintiff full compensation for that loss, but so far as he is entitled to damages for the suffering of being made a helpless cripple, you cannot proceed upon the principle of making full compensation. Whether what he said would convey that idea to the jury may perhaps be questioned.]

Then the plaintiff complains that the Judge did not tell the jury entirely to throw out of consideration the fact of the plaintiff having £3500 a year from property.

[JAMES, L. J. Is it not admissible in this way? A man with \*that amount of property would be more likely to [\*85] retire from practice than a man who has nothing.]

That is not disputed, but there is nothing in the summing up to show the jury that they ought not to give any other weight to the fact. What, however, the plaintiff mainly relies on is that the jury ought to have been distinctly told that, although as regards bodily injury, apart from pecuniary loss, they can go no further than to give what they think reasonable, without attempting to make full compensation, yet as to pecuniary loss, whatever difficulty there may be in ascertaining it, when it is ascertained the jury must give the full amount of it, without regard to the question whether it is of so large an amount as to make it extremely inconvenient to the defendants to pay it. The Judge has mixed the two things together in such a way as to lead the jury to treat the whole matter according to the rule applicable only to bodily injury, and to consider that they were not to give full compensation for the pecuniary loss.

Ballantine, Serjt., in reply. The defendants never contended that the £3500 a year should be taken into consideration as regards the plaintiff's pecuniary loss; but it is to be considered as regards the compensation for personal injury, since bodily suffering is more



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tolerable to a person who has the means of procuring every comfort.

JAMES, L. J. In this case we are of opinion that we cannot on any of the points differ from the judgment of the Queen's Bench Division.

The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which, generally speaking is considered to be within their exclusive province, that is to say, the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a Court of first instance, and if necessary of a Court

of Appeal in this way, that is to say, if in the judgment of [\*86] the \*Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for reconsideration by another jury. The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the LORD CHIEF JUSTICE, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate, and have no business to say. We are, therefore, of opinion that the Queen's Bench Division was right in directing a new trial.

Then if our decision remains unreversed by the House of Lords, where we understand this matter is to go, and the case goes before another jury, it may be important to see whether the direction of Mr. Justice FIELD was right. The Queen's Bench Division came to the conclusion that they could see no misdirection in the summing up of Mr. Justice FIELD, and the counsel for the plaintiff did not say that there is anything upon which they can put their finger and say, "Here is a misdirection." They principally go upon the ground that there is in the summing up an uncertainty which would have the effect of misdirection, and that the attention of the jury was not sufficiently drawn to the distinction between damages for personal injuries apart from pecuniary loss and damages for

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pecuniary loss actually resulting from the injuries. They also complain that the fact that the plaintiff and his wife had an income of £3500 a year was not absolutely withdrawn from the attention of the jury.

Now, on the first point, taking the whole of the summing up together, it seems to me that the case was put to the jury in the way in which the plaintiff's counsel contend that it ought to be put. Mr. Justice FIELD says, "An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened. That does not come into account here, and I only give it by way of illustration of what must pass through your minds for \* the purpose of seeing what sum is to be given. [\* 87] It is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the probable continuance of the plaintiff's professional income would have been." That comes to this, you are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable. I do not know how otherwise the case could be put. Again he says: "The damages to which a man is entitled are the consequences of the wrongful act by which he suffers. The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a sum of money as you think he would have been likely to earn if this accident had not happened." The case could not have been put more favourably for the plaintiff than it was thus put by Mr. Justice FIELD.

Then as regards the £3500 a year to which the plaintiff and his wife were entitled. The appellants' counsel say that it was not presented to the jury as bearing upon the amount of damages to be given for loss of professional income, but with reference to the damages for the want of enjoyment of life arising from bodily injury; and no doubt, as regards the personal injury, there are circumstances to which counsel may very legitimately call the attention of a jury as distinguishing a man with £3500 a year from a poor man. If the fact that the plaintiff had £3500 a year had been presented to the jury as a ground for diminishing the

damages to be given for loss of income, what was said by Mr. Justice FIELD might have been capable of being understood in such a sense as would make it a misdirection, but as we understand, it was not so put to the jury. The Judges of the Queen's Bench Division did not understand the ruling in that sense, nor do we feel it necessary so to understand it. When the matter goes down to another jury, whatever ambiguity there may have been in the summing-up will be set right, and it is not necessary for us to say that there was in this case such a direction as was likely to be misunderstood by the jury, or was likely to mislead them in the consideration of the case. Therefore the matter, so far as we are concerned, will stand exactly as it was left by the Court of Queen's Bench.

BRETT and COTTON, L. JJ., concurred.

*Appeal dismissed.*

#### ENGLISH NOTES.

The second trial of the second principal case took place before the Lord Chief Justice COLERIDGE. The jury, under the direction of the judge, assessed the damages at £16,000, taking into consideration the professional income of the plaintiff. Serjeant Ballantine with Dugdale moved *ex parte* for a new trial in the Common Pleas Division on December 6th, 1879, on the ground of misdirection and excessive damages. GROVE and LOPES, JJ., refused the motion. The case was then taken to the Court of Appeal by the learned Serjeant, who contended that the jury ought not to have made the plaintiff's professional income the basis of the damages, and that they ought not to have taken into account the special fees earned by the plaintiff; and that as the defendant company had no knowledge of the plaintiff's income, they ought not to have been made answerable for the loss of it. The Court consisting of the Lords Justices BRAMWELL, BRETT, and COTTON, dismissed the appeal, holding that the damages were not excessive, and that there was no misdirection. BRAMWELL, L. J., said that the following mode of directing the jury in cases of this kind has never been questioned: "You must give the plaintiff a compensation for his pecuniary loss. You must give him compensation for his pain and bodily suffering; of course, it is almost impossible for you to give an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all circumstances what is a fair amount to be awarded to him." He then put the case of a labourer earning twenty-five shillings a week, who, on account of injury, was totally incapacitated for work for twenty-six weeks, and then for ten weeks could not earn more than ten shillings a week,

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and was not likely to get into full work for another twenty weeks. The proper measure of damages would in that case be twenty-five shillings a week for twenty-six weeks plus fifteen shillings a week for the ten and twenty weeks, and damages for bodily suffering and medical expenses. COTTON, L. J., observed: "I may mention one matter which has not been dealt with. It has been urged that independent income ought to be taken into account in estimating the pecuniary loss. I cannot agree to that. The fact that he has an independent income does not make the plaintiff's pecuniary loss less. As to bodily suffering, the possession of an independent income may come into consideration, because a man may suffer very much from bodily injury when he is deprived of all means of support, and is reduced to such poverty that he cannot provide for himself what will alleviate his suffering; he is in a different position from the man who, having an independent income, meets with a similar accident." He however expressly forbore from giving a definite opinion on that point. *Phillips v. London and South Western Railway Company* (C. A. on 2nd trial 1879), 5 C. P. D. 280, 49 L. J. C. P. 233, 44 L. T. 217.

The defendant had, under an assignment by an executrix of all moneys due to her under her husband's will, seized and sold the stock upon the plaintiff's farm. She claimed the stock under a bill of sale given to her by a former occupier, of the stock then on the farm, as security for an advance made by her. The plaintiff had repeatedly applied to the defendant for an account of his claim. There was no satisfactory evidence to show that the original debt was still subsisting. The sale included many things which the defendant must have known were not included in the bill of sale, and there were other circumstances of great aggravation. The judge directed the jury that if they did not believe the debt to be due, they should find for the plaintiff, and that it was a proper case for vindictive damages. On a motion for a new trial, it was held that the direction was right, and that the jury having given beyond the full value of the goods seized, and more than double that value by way of damages, the Court were reluctant to interfere, although they thought that the damages were excessive, and recommended a compromise. *Thomas v. Harris* (1858), 27 L. J. Ex. 353.

When injury caused by undisputed negligence was permanent, and recovery was almost hopeless, the Court refused to reduce the damages awarded by the jury, if the judge was not dissatisfied with the verdict. *Britton v. The South Wales Railway Company* (1858), 27 L. J. Ex. 355. In *Higmore v. The Earl and Countess of Harrington* (1858), 3 C. B. (N. S.) 142, the Court refused to grant a new trial on the ground of excessive damages. The jury had awarded £750 to a clergyman for slander spoken of him to his curate.



The Court will not grant a new trial when the damages awarded by the jury are merely a little more or less than the substantial damage to the plaintiff. *Adams v. The Midland Railway Company* (1862), 31 L. J. Ex. 35; *Mostyn v. Coles* (1862), 7 H. & N. 872, 31 L. J. Ex. 151.

In *Poole v. Whitcombe* (1863), 12 C. B. (N. S.) 770, the Court granted a new trial under the following circumstances. The plaintiff brought an action for a trifling assault. The plaintiff's counsel informed the jury that if less than five guineas were awarded, he would not be entitled to his costs. The jury acting on this information awarded five guineas as damages.

In *Marsh v. Loader* (1864), 14 C. B. (N. S.) 535, 11 W. R. 784, the jury awarded £20 as damages to a child less than seven years old for false imprisonment. The child was caught by the defendant in the act of stealing some wood from his premises, and had been given into custody. The magistrate had discharged the child on the ground that a person of that age was legally incapable of committing a crime. The Court refused a new trial asked by the defendant on the ground that the damages were excessive.

In *Kelly v. Sherlock* (1866), L. R., 1 Q. B. 686, 35 L. J. Q. B. 209, 7 B. & S. 480, a new trial was refused under the following circumstances. The defendant published in his newspaper libels of a gross and offensive nature respecting the antecedents and demeanor of the plaintiff as a clergyman. At the trial no special damage was proved; and it was shown that the plaintiff had, after the publication of some of the offensive articles, but before the publication of the more serious libels, called the defendant's newspaper "the dregs of provincial journalism." He had also, in a sermon preached by him, charged some of his opponents with subornation of perjury. The jury found for the plaintiff, with damages one farthing. Held, by the majority of the Court (BLACKBURN and MELLOR, JJ., SHEE, J., dissenting), that there were circumstances which might have led the jury to the conclusion that the plaintiff was not entitled to a substantial compensation.

In *Forsdike v. Stone* (1868), L. R., 3 C. P. 607, 37 L. J. C. P. 301, a new trial of an action of slander, asked for on the ground of the inadequacy of damages, was not granted, because it did not appear that the jury had misconducted themselves or made a mistake, and because a new trial was not necessary to vindicate the plaintiff's character. But a new trial will be granted for inadequacy of damages in an action for slander where the smallness of the damages shows that the jury have made a compromise. *Falvey v. Stanford* (1875), L. R., 10 Q. B. 54, 44 L. J. Q. B. 7, 31 L. T. 677, 23 W. R. 162.

In *Pratt v. Graham* (C. A. 1890), 24 Q. B. D. 53, 59 L. J. Q. B.

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230; 38 W. R. 103, it was held that in an action of libel, the verdict of the jury will not be set aside and a new trial ordered, on the ground that the damages awarded are excessive, unless, having regard to all the circumstances of the case, the damages are so large that no reasonable man ought to have given them.

No appeal lies from the decision of a County Court where the judge has directed a new trial on the ground of excessive damages. *Howe v. London and North Western Railway Company* (C. A. 1892), 1892, 1 Q. B. 391, 61 L. J. Q. B. 368, 66 L. T. 398.

On a motion for a new trial on the ground of excess of damages, the Court has power to reduce the damages with the consent of the plaintiff alone, instead of granting a new trial. *Belt v. Larves* (C. A. 1884), 12 Q. B. D. 356, 53 L. J. Q. B. 249, 50 L. T. 441, 32 W. R. 607.

#### AMERICAN NOTES.

The amount of damages is always a question for the determination of the jury under the instructions of the judge. *McCoy v. Lemon*, 11 Richardson Law (Nor. Car.), 165; 70 Am. Dec. 246. The Court observed: "At this day (1856), we may lay it down as settled that in all cases sounding in damages, these damages are to be assessed by the jury under the authority of the Court, and not by the Court independently of the jury; and in all cases of vindictive damages the amount must depend on the sound discretion of the jury. Hence according to a series of adjudged cases, where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the Court, is to govern." Citing *Worster v. Canal Bridge*, 16 Pickering (Mass.), 541; *Stone v. Ketland*, 1 Washington (U. S. Circ. Ct.), 112; *Harvey v. Huggins*, 2 Bailey Law (So. Car.), 252. "This rule in no way conflicts with the practice of again submitting a case to the judgment of another jury in extreme cases, when the verdict is extravagant or trifling." See *Bishop v. Mayor of Macon*, 7 Georgia, 200; 50 Am. Dec. 400.

It is not enough to warrant a new trial that the damages, in the opinion of the Court, are too high or too low. *New Orleans, &c. R. Co. v. Hurst*, 36 Mississippi, 660; 74 Am. Dec. 785; *Milburn v. Beach*, 14 Missouri, 104; 55 Am. Dec. 91.

Damages must be outrageously excessive to warrant a new trial. *Worford v. Isbel*, 1 Bibb (Kentucky), 217; 4 Am. Dec. 633; *Clark v. Whitaker*, 19 Connecticut, 319; 48 Am. Dec. 160; *McDaniel v. Baca*, 2 California, 326; 56 Am. Dec. 339; *Roberts v. Swift*, 1 Yeates (Penn.), 209; 1 Am. Dec. 295; *Neal v. Lewis*, 2 Bay (So. Car.), 204; 1 Am. Dec. 640; *Vauch v. Hall*, 2 Pennington (N. Jer.), 578; 4 Am. Dec. 359; *Bodrell v. Osgood*, 3 Pickering (Mass.), 379; 15 Am. Dec. 228; *Larther v. Forgay*, 2 Louisiana Annual, 524; 46 Am. Dec. 554.

In such cases the verdict is controlling as to amount of damages, unless it is so flagrantly excessive or trifling as to shock the sense of justice, and indicate that the jury were influenced by partiality, corruption, passion, or

prejudice. *Schlenker v. Risley*, 3 Scammon (Illinois), 183; 38 Am. Dec. 100, and cases cited in note, 106; *Terre Haute, &c. R. Co. v. Vanatta*, 21 Illinois, 188; 74 Am. Dec. 96; *Kimball v. City of Bath*, 38 Maine, 219; 61 Am. Dec. 213; *Howard v. Grocer*, 28 Maine, 97; 48 Am. Dec. 478; *Coffin v. Coffin*, 4 Massachusetts, 1; 3 Am. Dec. 189; *Ross & Co. v. Innis*, 35 Illinois, 487; 85 Am. Dec. 373; *Farish v. Reigle*, 11 Grattan (Virginia), 697; 62 Am. Dec. 666; *Nicholson v. N. Y., &c. R. Co.*, 22 Connecticut, 74; 56 Am. Dec. 390; *St. Martin v. Desnoyer*, 1 Minnesota, 156; 61 Am. Dec. 491; *Douglass v. Tousey*, 2 Wendell (New York), 352; 20 Am. Dec. 616; *Davis v. Ruff*, Cheves Law (So. Car.), 17; 31 Am. Dec. 584; *Sanders v. Johnson*, 6 Blackford (Indiana), 50; 36 Am. Dec. 564; *Baker v. Young*, 44 Illinois, 42; 92 Am. Dec. 149; *Curtis v. Rochester, &c. R. Co.*, 20 Barbour (New York), 282; 18 New York, 534; *Root v. King*, 7 Cowen (New York), 613; *Ryckman v. Parkins*, 9 Wendell (New York), 470; *Western Un. Tel. Co. v. Houghton*, 82 Texas, 561; 27 Am. St. Rep. 918; *Louisville, &c. R. Co. v. Minogue*, 90 Kentucky, 369; 29 Am. St. Rep. 378; *Morgan v. South Pac. Co.*, 95 California, 510; 29 Am. St. Rep. 143, and note, 149; *Battrell v. Ohio R. R. Co.*, 34 West Virginia, 232; 11 Lawyers' Rep. Annotated, 290.

A new trial will not be granted merely on the ground of inadequacy of damages. *Pritchard v. Hewitt*, 91 Missouri, 517; 60 Am. Rep. 265; *Moore v. Protection Ins. Co.*, 29 Maine, 97; 48 Am. Dec. 514.

But where the verdict is grossly inadequate and utterly disproportioned to the injury proved, a new trial will be awarded. *Bishop v. Mayor of Macon*, 7 Georgia, 200; 50 Am. Dec. 400; *McDonald v. Walter*, 40 New York, 551.

The subject is exhaustively discussed in Graham and Waterman on New Trials, with the conclusions above stated. A large collection of cases is made in 16 Am. & Eng. Enc. of Law, pp. 585-592.

The number of cases involving the question, what amount of damages is so excessive as to warrant a new trial under the foregoing rules, is vast, and every case depends upon its own circumstances, but two may be cited as types. In *Crocker v. Chicago, &c. Ry. Co.*, 36 Wisconsin, 657; 17 Am. Rep. 501, a railway conductor having kissed a female passenger against her will, a verdict of \$1000 against the company was sustained, the Court, by Chief Justice RYAN, devoting some six pages to a setting forth of the enormity of the offence: waxing very warm in vindication of woman's rights; quoting the "beautiful and comprehensive language" of Mr. Justice Story, "worthy of him as jurist and gentleman:" lashing the defendant because "like the English Crown, it lays its sins upon its servants, and claims that it can do no wrong;" and finally, adopting the *argumentum ad hominem*, exclaimed: "Who can be found to say that such an amount would be in excess of compensation to his own or his neighbour's wife, or sister, or daughter?" To this fervid rhetoric the admission: "We might have been better satisfied with a verdict for less. But it is not for us, it was for the jury, to fix the amount," had to yield.

On the other hand, in *Chattanooga, &c. R. Co. v. Lyon*, 89 Georgia, 16; 32 Am. St. Rep. 72 (the syllabus in the latter is headed, "The Law and the Lady"), where a young lady passenger was carried a mile and a half past her

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destination, and put off without personal violence, and without exposure to serious inconvenience, or real danger or harm, in returning by a pleasant walk through the woods, a verdict of two thousand dollars, was held excessive, although the conductor, in commanding her to leave the train, spoke in a loud tone. The Court was much less gallant than the Wisconsin Court, and observed: "This Court, we trust, is not wanting in respect and devotion to the fair women of Georgia. We regard them as incomparably the best and most admirable portion of our population, and will never be disposed to deny them the fullest protection in the enjoyment of all their rights which the law, properly administered, can give. At the same time, we are unwilling to subject ourselves to such a criticism as was made by that great judge, Hon. IVERSON L. HARRIS, upon his distinguished brethren, in *Clements v. Bostwick*, 38 Ga. 1, in which he thought they had stretched a principle very far in sustaining a widow's right to dower. Speaking of their judgment, he said it could be justified only on the ground on which Steele defended Dryden, who had compared the Duchess of Cleveland to Cato, the wit vindicating the poet by saying, 'There was no stretching a metaphor too far when a lady was in the case.' We fear that courts and juries are becoming too apt to stretch damages too far when they are to be awarded to one of the gentler sex. Judge HARRIS concludes his dissenting opinion by saying: 'For many years I have witnessed with uneasiness the quixotism which the bench displays whenever a woman is a party, or a woman's claims are involved. I fear that it is an incurable insanity, as thus far it has exhibited no obedience to law, and is deaf to reason, and even insensible to ridicule.'"

In Utah, where women are very numerous, a verdict of \$50 for putting one off a railway train at a wrong station, thus compelling her to walk three and a half miles to her destination, was deemed not excessive. *Durfee v. Union P. R. Co.*, 9 Utah, 213.

In *Fordyce v. Nic*, 58 Arkansas, 136 (A. D. 1893), a verdict of \$1000 was held not excessive when the plaintiff was ejected at a wrong station by a drunken conductor, who used rude and profane language to him in the presence of plaintiff's family. The Court said: "This Court, according to a rule long ago established, and supported by the great weight of authority, will not interpose unless the amount is so flagrantly unjust or unreasonable as to indicate passion, prejudice, corruption, or a failure to appreciate the law and facts presented."

A useful list of authorities on the subject of excessive damages for personal injuries may be found in a note, 14 Lawyers' Rep. Annotated, 677. In the case to which that note is appended the Kentucky Court laid it down that ten thousand dollars was as high a verdict as the Court would allow to stand. The American doctrine seems to be that damages are exclusively in the discretion of the jury unless they are too liberal, and then it is a question for another jury! It is not uncommon however in some of the States for the appellate court to grant a new trial unless the respondent shall consent to reduce the recovery to a specified amount.



## DEAD BODY.

(And see *Reg. v. Heyford*, No 3 of "Coroner," 7 R. C. 156 and notes, p. 168 *et seq.*)

## No. 1. — REG. v. STEWART.

(Q. B. 1840.)

## No. 2. — REG. v. PRICE.

(Q. B. D. 1884.)

## RULE.

IN this country a duty arises by the common law to give Christian burial to (or otherwise decently to put away) a dead body. *Prinſ facie* the duty is thrown upon the householder in whose house the body is.

To burn a dead body in a decent manner instead of burying it is not a misdemeanor; unless an inquest is thereby prevented, which ought to have been held.

## Reg. v. Stewart and Another.

12 Adolphus & Ellis, 773-779 (s. c. 4 P. & D. 349).

*Dead Body. — Right to Christian Burial.*

[773] The overseers of a parish are not (at common law) bound to bury the body of a pauper lying in the parish, but not in a parochial house; although such pauper was a married woman whose husband is settled in the parish and receiving relief there.

Every person dying in this country, and not within certain ecclesiastical prohibitions, is entitled to Christian burial.

*Seemle*, that, where no such prohibition attaches, every householder, in whose house a dead body lies, is bound by the common law to inter the body decently; and that, upon this principle, where a body lies in the house of a parish or union, the parish or union must provide for the interment.

In last Hilary term this Court made the following order.

"Upon reading" &c., "and upon hearing Mr. Platt, of counsel for the president, vice-presidents, treasurers, and governors of St. George's Hospital, in the county of Middlesex, and Mr. Bodkin, on

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behalf of James Stewart and Thomas Hodgkinson, overseers of the poor of the parish of St. George, Hanover Square, in the said county, it is ordered that Wednesday next be given to the said James Stewart and Thomas Hodgkinson, to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to remove from the said hospital and cause to be interred the body of Mary Kershaw, deceased; upon notice of this rule to be given to the said overseers in the mean time. And it is further ordered that the body of the said Mary Kershaw be in the mean time interred at the expense of the president, vice-presidents, treasurers, and governors of \*the said hospital; the said [\* 774] overseers hereby undertaking not to take any advantage of the body having been so interred, and to repay the costs incurred by the removal and interment of it, in case this Court shall be of opinion that they are bound to remove it and cause it to be interred."

By the affidavits it appeared that Mary Kershaw, being a married woman and residing with her husband in the parish of St. George, Hanover Square, was admitted, as an in-patient, to St. George's Hospital in that parish, and died in the hospital, and that her corpse remained unburied at the time of the application, the husband being unable from poverty to take it away and bury it. He was then, and had been for the last three years, receiving a weekly allowance from the overseers; and he deposed to his belief that he was entitled to a settlement in the parish. The parish officers had been requested to bury the body, but had refused. The affidavits contained statements respecting the history of St. George's Hospital; showing, as was contended, an obligation on the hospital to inter the body; but the facts and arguments on this point are omitted, as the Court decided the case on general grounds. In this term,<sup>1</sup>

Bodkin and Doane showed cause. The overseers are not bound, nor entitled, to dispose of the parish funds for this purpose. It is said, in Com. Dig., Cemetery (B), that by the custom of England every person entitled to Christian burial may have burial in the church-yard where he dies; but this shows no obligation on the parish officers. \* There can be no common-law duty [\* 775] incumbent on overseers, who are officers existing only by

<sup>1</sup> November 5th, before Lord DENMAN, C. J., LITLEDALE, WILLIAMS, and COLERIDGE, JJ.

statute. 43 Eliz. c. 2. What would be the law in an extra-parochial district? Stat. 48 Geo. III. c. 75 directs interment by the parish officers of bodies cast on the sea-shore, the treasurer of the county to repay the expense. This special provision would have been unnecessary, if the parish officers were under a general liability to bury such dead bodies as there are no other means of interring. Nor does any liability result, even as to the bodies of persons settled in the parish, from Stat. 43 Eliz. c. 2. The overseers are directed, by the statute, to apply the parish funds to two purposes: first, setting the poor on work; secondly, relieving the impotent poor. Neither of these can include burial of a deceased pauper. It is possible that an irregular practice of defraying such expenses may have occasionally taken place; but, since Stat. 4 & 5 Wm. IV. c. 76, the law as to parochial expenditure must be administered scrupulously. In an *Anonymous Case (In the Matter of —, Overseers of —, 3 Ad. & El. 552)*, soon after the statute passed, it was decided that an overseer could not be compelled to defray the expense of vaccinating parish paupers, though he had been party to a contract with a medical man for performing the operation; the Court thinking that the duty was not prescribed by statute, and did not result from those duties which were prescribed. The mode of burying the dead was held to be matter of ecclesiastical cognizance in *Rex v. Coleridge*, 2 B. & Ald. 806 (21 R. R. 498).

Sir J. Campbell, Attorney-General, and Platt, *contra*.

[\*776] In early times, this expense was probably borne by \* religious houses. The duty is now incumbent on the overseers, and is here, at any rate, a part of the relief claimable by the surviving husband, who is settled in the parish. The case is within Stat. 43 Eliz. c. 2. In *Rex v. Coleridge*, the application related merely to the mode of burial; it appears from the language of the Court there that a *mandamus* would go to an incumbent who refused to perform the duty at all. Stat. 48 Geo. III. c. 75 shows that there was previously no provision for burying bodies cast on shore; but the question here is as to the body of a pauper settled in the parish, whose husband, also settled in the parish, is unable to meet the expense. And sect. 1 of that Act mentions the sum "allowed in such parish for the burial of any person or persons buried at the expense of such parish." There is no precedent of the disallowance of such expenses. *Cur. adv. vult.*

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Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an application for a *mandamus*, to the overseers of the parish, to remove the dead body of a pauper, settled in the parish, who had died within it, in St. George's Hospital, from that place, and to cause it to be buried. The application was made on behalf of the hospital; and although upon the argument we felt extreme difficulty in placing on any legal foundation, either the right of the hospital to the writ, or the obligation on the parish to do the act required, yet we were unwilling at once to discharge the rule, considering how long the practice had prevailed, and been sanctioned, of burying \* such persons at the expense of the [\* 777] parish, and the general consequences of holding that such practice has no warrant in law.

In the argument for the rule, the necessity of the case, a very large construction of the words of the statute of 43 Eliz. c. 2, and an inference from Stat. 48, Geo. III., c. 75, for the burial of shipwrecked bodies cast on shore, were alone relied on. These all appear to us insufficient. In the last-named statute there are undoubtedly words from which it may be inferred that the framers of it recognized burials at the expense of the parish; and, in a doubtful case, such recognition might weigh something in affirmance of the legal obligation on the parish to provide such burials. But in the present case we are thrown necessarily on the statute of Elizabeth: the overseer is a statutable officer, dealing with a statutable fund, and accountable for its application to statutable purposes. The language of that statute leaves no doubt. The relief and the employment of the chargeable poor are its objects; the fund is created for them, and cannot be diverted from them, unless to objects specifically engrafted on them by subsequent statutes, of which this is not one. No usage, however proper in itself, or however uninterrupted, can prevail against that which the plain construction of a statute forbids; and we cannot accede to the argument that the burial of a pauper receiving relief, but not dying in any parish house, can be brought within the objects of the statute, expressed or implied.

We limit the rule thus, purposely; for, in passing on to the ground of necessity, we wish to be understood as distinctly recognizing its existence, while we deny its application in the way now contended for. Every \* person dying in this [\* 778] country, and not within certain exclusions laid down by



the ecclesiastical law, has a right to Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery. Further, to use the words of Lord STOWELL in *Gilbert v. Buzzard*, 2 Hagg. Consist. Rep. 333, 344, "that bodies should be carried in a state of naked exposure to the grave, would be a real offence to the living as well as an apparent indignity to the dead." We have no doubt, therefore, that the common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose. The feelings and the interests of the living require this, and create the duty; but the question is, on whom it falls. It is enough for the disposal of this rule to say that it is not cast upon the overseers, where the death does not take place under the roof of any parish house, or that which, under the circumstances, can be considered as such.

But the principles above laid down seem to point to an important distinction: and we think it right, in the present case, with a view to the extensive consequences of our decision, to state it. It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial: he cannot keep him unburied, nor do anything which prevents Christian burial: he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason, he cannot carry him uncovered to the grave. It will probably be found, [\* 779] \* therefore, that, where a pauper dies in any parish house, poor-house, or union-house, that circumstance casts on the parish or union, as the case may be, to bury the body; not by virtue of the statute of Elizabeth, but on the principles of the common law.

In the present case, however, the same principles would rather cast the burthen on the hospital than the parish, and form an additional, though not a necessary, reason for refusing the writ.

*Rule discharged.*

**Reg. v. Price.**

12 Q. B. D. 247-256 (s. c. 53 L. J. M. C. 51; 33 W. R. 45 n.; 15 Cox C. C. 389).

*Dead Body. — Cremation.*

To burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance. [247]

If an inquest ought to be held upon a dead body, it is a misdemeanor so to dispose of the body as to prevent the coroner from holding the inquest.

At the assizes held at Cardiff before STEPHEN, J., in February, 1884, William Price was indicted for attempting to burn the body of his child, instead of burying it; and a second indictment charged him with attempting to burn the body with intent to prevent the holding of an inquest upon it.

G. B. Hughes, Q. C., and B. T. Williams, appeared for the prosecution.

The prisoner was undefended.

After hearing counsel for the prosecution, the learned Judge left the case to the jury, directing them in the terms of his charge to the grand jury, which, on account of the importance and novelty of the subject to which it relates, is here given. The jury acquitted the prisoner on both charges.

STEPHEN, J. One of the cases to be brought before you is so singular in its character, and involves a legal question of so much novelty and of such general interest, that I propose to state at some length what I believe to be the law upon the matter. I have given it all the consideration I could, and I am permitted to say that although I alone am responsible for what I am about to say to you, Lord Justice FRY takes the same view of the subject as I do, and for the same reasons.

William Price is charged with a misdemeanor under the following circumstances: He had in his house a child five months old of which he is said to have been the father. The child died, and Price, as it seems, did not register its death. The coroner accordingly gave him notice on Saturday, the 12th of January, 1884, that unless he sent a medical certificate of the cause of the child's death, he (the coroner) would hold an inquest \* on [\* 248] the body on the following Monday. Price, on the Monday afternoon, took the body of the child to a field of his own, some distance from the town of Llantrissant, put it into a ten-gallon

cask of petroleum and set the petroleum on fire. A crowd collected, the body of the child which was burning was covered with earth, and the flames were extinguished, and Price was brought before the magistrates and committed for trial. He will be indicted before you on a charge which in different forms imputes to him as criminal two parts of what he is said to have done, Namely, first, his having prevented the holding of an inquest on the body; and secondly, his having attempted to burn the child's body.

With respect to the prevention of the inquest the law is, that it is a misdemeanor to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one which ought to be held. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought, to hold an inquest, and to prevent him from doing so by disposing of the body in any way — for an inquest must be held on the view of the body — is a misdemeanor. The depositions in the present case do not very clearly show why the coroner considered an inquest necessary. If you think that the conduct of Price was such as to give the coroner fair grounds for holding one, you ought to find a true bill, for beyond all question Price did as much as in him lay to dispose of the body in such a manner as to make an inquest impossible.

The other fact charged as criminal is the attempt made by Price to burn the child's body, and this raises, in a form which makes it my duty to direct you upon it, a question which has been several times discussed, and has attracted some public attention, though so far as I know no legal decision upon it has ever [\* 249] \* been given, the question, namely, whether it is a misdemeanor at common law to burn a dead body instead of burying it.

As there is no direct authority upon this question I have found it necessary to examine several branches of the law which bear

upon it more or less remotely. The practice of burning dead bodies prevailed to a considerable extent under the Romans as it does to this day amongst the Hindoos, though it is said that the practice of burial is both older and more general. Burning appears to have been discontinued in this country and in other parts of Europe when Christianity was fully established, as the destruction of the body by fire was considered, for reasons to which I need not refer here, to be opposed to Christian sentiment, but this change took place so long ago, and the substitution of burial for burning was so complete, that the burning of the dead has never been formally forbidden or even mentioned or referred to, so far as I know, in any part of our law. The subject of burial was formerly, and for many centuries exclusively, a branch of the ecclesiastical or canon law. Amongst the English writers on this subject little is to be found relating to burial. The subject was much more elaborately and systematically studied in Roman Catholic countries than in England, because the law itself prevailed much more extensively. In the *Jus Ecclesiasticum* of Van Espen, II. 142–168, Part II. sect. iv. tit. vii., there is an elaborate discourse, filling twenty-two folio pages in double columns, on the subject of burial, in which every branch of the subject is systematically arranged and discussed, with references to numerous authorities. The importance of it is that it shows the view taken by the Canonists, and this view had great influence on our own ecclesiastical lawyers, though only a small part of the canon law itself was ever introduced into this country.

Van Espen throughout regards the participation in funeral rites as a privilege to which, subject to certain conditions, all the members of the Church were entitled, and the deprivation of which was a kind of posthumous punishment analogous to the excommunication of the living. The great question with which he occupies himself is, In what cases ought burial to be denied? The general principle is, that those who are not worthy of Church privileges in life are also to be excluded from them \*after [\* 250] death. (“*Sicuti enim nonnullos vivos a suâ communione, præsertim in sacris, jam pridem excludendos censuit, ita quoque eosdem suâ communione post mortem indignos credidit.*”) As for the manner in which the dead bodies of persons deprived of Christian burial were to be disposed of, Van Espen says only that though in some instances the civil power may have entirely forbidden



burial, whereby bodies may remain unburied and exposed to the sight of all to be devoured by beasts or destroyed by the weather (he considers the dissection of criminals as a case of this sort), the Church has never made such a provision, and has never prohibited the covering of such corpses with the earth.

This way of looking at the subject seems to explain how the law came to be silent on exceptional ways of disposing of dead bodies. The question was, In what cases burial must be refused? As for the way of disposing of bodies to which it was refused, the matter escaped attention, being probably regarded as a matter which interested those only who were so unfortunate as to have charge of such bodies.

The famous judgment of Lord STOWELL in the case of iron coffins (*Gilbert v. Buzzard*, 2 Hag. Con. Rep. 333), which constitutes an elaborate treatise on burial, proceeds upon the same principles. The law presumes that every one will wish that the bodies of those in whom he was interested in their lifetime should have Christian burial. The possibility of a man's entertaining and acting upon a different view is not considered.

These considerations explain the reason why the law is silent as to the practice of burning the dead. Before I come to consider its legality directly, it will be well to notice some analogous topics which throw light upon it. There is one practice which has an analogy to funereal burning, inasmuch as it constitutes an exceptional method of dealing with dead bodies. I refer to anatomy. Anatomy was practised in England at least as far back as the very beginning of the seventeenth century. It continued to be practised without, so far as I know, any interference on the part of the Legislature down to the year 1832, in which was passed the Act for

regulating schools of anatomy — 2 & 3 Wm. IV., c. 75. This [\*251] Act recites the importance of anatomy,\* and that "the legal supply of human bodies for such anatomical examination is insufficient fully to provide the means of such knowledge." It then makes provision for the supply of such bodies by enabling "any executor or other party having lawful possession of the body of any deceased person," to permit the body to be dissected, except in certain cases. The effect of this has been that the bodies of persons dying in various public institutions whose relations are unknown are so dissected. The Act establishes other regulations not material to the present question, and enacts that

after examination the bodies shall be “decently interred.” This Act appears to me to prove clearly that Parliament regarded anatomy as a legal practice, and further, that it considered that there was such a thing as “a legal supply of human bodies,” though that supply was insufficient for the purpose. This is inconsistent with the opinion that it is an absolute duty on the part of persons in charge of dead bodies to bury them, and this conclusion is rather strengthened than otherwise by the provision in s. 13, that the “party removing” the body shall provide for its decent burial after examination. This seems to imply that apart from the Act the obligation to bury would not exist, and it is remarkable that the words are not, as in the earlier section, “executor or other party,” but “party removing,” referring no doubt to the master of the workhouse or other person in a similar position who hands the body over to the surgeons. Upon him the statute imposes the duty of decently interring the bodies with which he is allowed to deal. The executor’s rights at common law, whatever they may be, are not altered.

I come now to a series of cases more closely connected with the present case. As is well known the great demand for bodies for anatomical purposes not only led in some cases to murders, the object of which was to sell the body of the murdered person, but also to robberies of churchyards by what were commonly called resurrection men. This practice prevailed for a considerable length of time, as appears from the case of *Ree v. Lyan*, 2 T. R. 738 (1 R. R. 607), decided in 1788 — forty-four years before the Anatomy Act. In that case it was held to be a misdemeanor to disinter a body for \*the purpose of dissection, the Court [\*252] saying that common decency required that the practice should be put a stop to, that the offence was cognizable in a criminal court as being “highly indecent and *contra bonos mores*, at the bare idea alone of which nature revolted.” They also said that “it had been the regular practice of the Old Bailey in modern times to try charges of this nature.” It is to be observed in reference to this case that the act done would have been a peculiarly indecent theft if it had not been for the technical reason that a dead body is not the subject of property. The case, however, has been carried a step farther in modern times. It was held in *Reg. v. Sharpe*, 1 Dears. & B. 160, to be a misdemeanor to disinter a body at all without lawful authority, even when the motives of

the offender were pious and laudable, the case being one in which a son disinterred his mother in order to bury her in his father's grave, but he got access to the grave and permission to open it by a false pretence.

The law to be collected from these authorities seems to me to be this: The practice of anatomy is lawful and useful though it may involve an unusual means of disposing of dead bodies, and though it certainly shocks the feelings of many persons, but to open a grave and disinter a dead body without authority is a misdemeanor, even if it is done for a laudable purpose.

These cases, for the reasons I have given, have some analogy to the case of burying a dead body, but they are remote from it. They certainly do not warrant the proposition that to burn a dead body is in itself a misdemeanor.

Two other cases come rather nearer to the point. They are *Reg. v. Vann*, 2 Den. 325, and *Reg. v. Stewart*, 12 A. & E. 773, 779; 4 Perry & D. 349; p. 462, *ante*. Each of these cases lays down in unqualified terms that it is the duty of certain specified persons to bury in particular cases. The case of *Reg. v. Stewart* lays down the following principles: "Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial: and that implies the right to be carried from the place where his body lies to the parish cemetery."

It adds, "The individual under whose roof a poor person [\*253] dies is bound" (*i.e.* if no one \*else is so bound, — as appears from the rest of the case) "to carry the body decently covered to the place of burial. He cannot keep him unburied, nor do anything which prevents Christian burial. He cannot, therefore cast him out so as to expose the body to violation, or to offend the feelings or endanger the health of the living; for the same reason he cannot carry him uncovered to the grave." In the case of *Reg. v. Vann*, 2 Den. 325, the Court held: "That a man is bound to give Christian burial to his deceased child if he has the means of doing so; but he is not liable to be indicted for a nuisance if he has not the means of providing burial for it."

These cases are the nearest approach which I have been able to find to an authority directly upon the present point. It may be said that if there is an absolute duty upon a man having the means to bury his child, and if it is a duty to give every corpse Christian burial, the duty must be violated by burning it. I do

not think, however, that the cases really mean to lay down any such rule. The question of burning was not before the Court in either case. In *Reg. v. Stewart*, 12 A. & E. 773, 779; p. 462, *ante*, the question was whether the duty of burial lay upon the parish officers or on some other person. In *Reg. v. Vann*, 2 Den. 325, the question was whether a man who had not the means to bury his child was bound to incur a debt in order to do so. In neither case can the Court have intended to express themselves with complete verbal accuracy, for in the case of *Reg. v. Stewart*, the Court speaks of the "rights" of a dead body, which is obviously a popular form of expression, — a corpse not being capable of rights, and in both cases the expression "Christian burial" is used, which is obviously inapplicable to persons who are not Christians, Jews for instance, Mohammedans, or Hindoos. To this I may add that the attention of neither Court was called to the subject of anatomy already referred to. Skeletons and anatomical preparations could not be innocently obtained if the language of the cases referred to were construed as if it were intended to be severely and literally accurate.

There is only one other case to be mentioned. It is the case \* of *Williams v. Williams*, which was decided [\* 254] just two years ago by KAY, J., in the Chancery Division of the High Court, and is reported in the Law Reports, 20 Ch. D. 659; 51 L. J. Ch. 335. In this case one H. Crookenden directed his friend, Eliza Williams, to burn his body, and directed his executors to pay her expenses. The executors buried the body. Miss Williams got leave from the Secretary of State to disinter it, in order, as she said, to be buried elsewhere. Having obtained possession of it by this misrepresentation, she burnt it, and sued the executors for her expenses. The case leaves the question now before me undecided. "The purpose," says KAY, J., "confessedly was to have the body burnt, and thereupon arises a very considerable question whether that is or is not a lawful purpose according to the law of this country. That is a question I am not going to decide." He held that in that particular case the removal of the body and its burning were both illegal, according to the decision of *Reg. v. Sharpe*, 1 D. & B. 160, already referred to. "Giving the lady credit," he said, "for the best of motives, there can be no kind of doubt that the act of removing the body by that license and then burning it was as distinct a fraud on that license as any-



thing could possibly be." This was enough for the purposes of the particular case, and the learned Judge accordingly expressed no opinion on the question on which it now becomes my duty to direct you.

The question arises in the present case in a perfectly clear and simple form, unembarrassed by any such consideration as applied to the other cases to which I have referred. There is no question here of the illegality and dishonesty which marked the conduct of those who were described as resurrection men, nor of the artifices, not indeed criminal but certainly disingenuous, by which possession of the body was obtained in the cases of *R. v. Sharpe*, and *Williams v. Williams*. Price had lawful possession of the child's body, and it was not only his right but his duty to dispose of it by burying or in any other manner not in itself illegal. Hence I must consider the question whether to burn a dead body instead of burying it is in itself an illegal act.

After full consideration, I am of opinion that a person who burns instead of burying a dead body does not commit a [\* 255] criminal \* act, unless he does it in such a manner as to amount to a public nuisance at common law. My reason for this opinion is that upon the fullest examination of the authorities, I have, as the preceding review of them shows, been unable to discover any authority for the proposition that it is a misdemeanor to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one.

There are some instances, no doubt, in which Courts of justice have declared acts to be misdemeanors which had never previously been decided to be so, but I think it will be found that in every such case the act involved great public mischief or moral scandal. It is not my place to offer any opinion on the comparative merits of burning and burying corpses, but before I could hold that it must be a misdemeanor to burn a dead body, I must be satisfied not only that some people, or even that many people, object to the practice, but that it is, on plain, undeniable grounds, highly mischievous or grossly scandalous. Even then I should pause long before I held it to be a misdemeanor, for many acts involving the grossest indecency and grave public mischief — incest, for instance, and, where there is no conspiracy, seduction or adultery — are not misdemeanors, but I cannot take even the first step. Sir Thomas Browne finishes his famous essay on *Urn*

Burial with a quotation from Lucan, which, in eight words, seems to sum up the matter: "*Tabesne cadavera solvat an rogos haud refert.*" Whether decay or fire consumes corpses matters not. The difference between the two processes is only that one is quick, the other slow. Each is so horrible that every healthy imagination would turn away from its details; but one or the other is inevitable, and each may be concealed from observation by proper precautions. There are, no doubt, religious convictions and feelings connected with the subject which every one would wish to treat with respect and tenderness, and I suppose there is no doubt that as a matter of historical fact the disuse of burning bodies was due to the force of those sentiments. I do not think, however, that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanor at common law. The statement of such a proposition, in plain words, is a sufficient \* refuta- [\* 256] tion of it, but nothing short of this will support the conclusion that to burn a dead body must be a misdemeanor. As for the public interest in the matter, burning, on the one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might no doubt destroy the evidence of crime. These, however, are matters for the Legislature, and not for me. It may be that it would be well for Parliament to regulate or to forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law. This rule is no doubt subject to exceptions, but they are rare, narrow, and to be admitted with the greatest reluctance, and only upon the strongest reasons.

This brings me to the last observation I have to make. Though I think that to burn a dead body decently and inoffensively is not criminal, it is obvious that if it is done in such a manner as to be offensive to others it is a nuisance of an aggravated kind. A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive both to sight and to smell can be imagined. The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but

if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill.

#### ENGLISH NOTES.

As to the right to funeral expenses, see *Stag v. Punter*, No. 16 of "Administration," 2 R. C. 147, and Notes.

By 48 Geo. III. c. 75, s. 1, the overseers of parishes throughout England in which any dead human bodies shall be found thrown in or cast on shore from the sea, by wreck or otherwise, are required to cause such bodies to be buried. And by s. 5, the overseers are to be reimbursed the expenses by the County treasurer. In the case of *The Churchwardens of Woolwich v. Robertson* (1881), 6 Q. B. D. 654, 50 L. J. M. C. 87, 44 L. T. 747, 29 W. R. 892, it was held that bodies cast up on the shore of a navigable river (from the foundering of the *Princess Alice* in the Thames off Woolwich) were not "cast on shore from the sea" within the meaning of the Act, so that the parishes could not recover the expenses from the County.

By statute 7 & 8 Vict. c. 101, s. 31, as amended by 18 & 19 Vict. c. 79 and 43 & 44 Vict. c. 41, s. 2, the guardians or overseers of the poor are authorised to bury the body of any poor person which may be within their district.

The law of England recognises no property in a dead body. *Reg. v. Sharpe* (1857), 1 Dearsley & Bell C. C. 160, 7 Cox C. C. 214, 26 L. J. M. C. 47, 3 Jur. N. S. 192.

But the executors are, *primâ facie*, the persons entitled to the possession, and responsible for the burial (or decent disposal) of the body. *Reg. v. Fox* (1841), 2 Q. B. 246, 1 G. & D. 566; *Williams v. Williams* (1882), 20 Ch. D. 659, 664, 15 Cox C. C. 39, 51 L. J. Ch. 385, 46 L. T. 275, 30 W. R. 438.

When once the body is buried in a proper place it is a misdemeanor at common law to remove it without the sanction of the proper guardians of the place. *Reg. v. Sharpe, supra*. And it is by the Act 20 & 21 Vict. c. 81, s. 25, unlawful to remove it except under the conditions there laid down. Where the licence of a Secretary of State for removal is obtained under the Act, upon a representation that the body is to be removed to another burial ground, it has been held unlawful to remove it to another place for cremation before re-interment. *Williams v. Williams, per KAY, J., supra*.

A curious application to the Consistory Court of London, as guardians of a consecrated burial ground, was made *In the Matter of Lieut. Col. Dixon* (1892), 1892, P. 386, 56 J. P. 841. The will of the de-

Nos. 1, 2. — Reg. v. Stewart; Reg. v. Price. — Notes.

ceased had contained no directions as to the mode or place of burial, but expressed a wish that his wife should have the option of disposing of his remains either by burial or cremation. The widow caused the body to be buried in a mausoleum in consecrated ground in Kensal Green Cemetery. Eighteen years afterwards the widow applied to the Court for a faculty for removal of the remains to the crematorium at Woking, to be reduced to ashes there in order that the ashes should be deposited in an urn and replaced in the mausoleum. The Chancellor of the Court, Dr. TRISTRAM, Q. C., refused the application on the ground that the site of the consecrated ground is under the exclusive control of the Ecclesiastical Courts; and no body buried there can be removed without a faculty, which, according to the rule established by a practice of centuries and sanctioned by the Legislature by 20 & 21 Vict. c. 81, s. 25, is only granted for the purpose of reinterment in other consecrated ground. When burial in consecrated ground and cremation are both desired, cremation should precede, and not follow burial.

#### AMERICAN NOTES.

The precise question involved in the Rule has apparently not arisen here. Other questions concerning dead bodies, including the right of burial and change of place of burial and property in a dead body, have occasionally been considered. Appended to 4 Bradford's Surrogate's Reports (New York), p. 522, is a very learned report on these subjects, by Samuel B. Ruggles, to the Supreme Court, and they were also exhaustively examined in *Pierce v. Swan Point Cemetery*, 10 Rhode Island, 227; 14 Am. Rep. 667, citing the principal case, but not passing on the particular point, although apparently involving it. The decision was that relatives of a deceased person have rights in his body which Courts will protect, for the reason that such persons "have duties to perform toward it arising out of our common humanity," and so the Court directed the restoration of a body to a grave in which it had been buried by the next of kin, and from which it had been removed by the widow for the purpose of interment in a different place provided by her. (To the same effect, *Wynkoop v. Wynkoop*, 42 Pennsylvania State, 293; 82 Am. Dec. 506.) Compare *Weld v. Walker*, 130 Massachusetts, 422; 39 Am. Rep. 465; *Hackett v. Hackett*, 18 Rhode Island, 155; 19 Lawyers' Rep. Annotated, 558.

It is the duty of the husband to bury his dead wife. *Durell v. Hayward*, 9 Gray (Mass.), 248; *Lakin v. Ames*, 10 Cushing (Mass.), 221. Even if she had an estate. *Smyley v. Reese*, 53 Alabama, 89; 25 Am. Rep. 598.

It is the duty of the executor to bury the testator, and the expense is a charge upon the estate. *Patterson v. Patterson*, 59 New York, 574; 17 Am. Rep. 384, citing the principal case.

The principal case is cited in *McClellan v. Filson*, 44 Ohio St. 184; 58 Am. Rep. 814, but it is not in point.

The duty of burial rests on the executor or administrator, and not on the next of kin. *Scott v. Riley*, 16 Philadelphia, 106, disapproving Mr. Ruggles'



opinion cited above, and observing: "The common law casts the duty of burying the dead in a proper manner and place upon the person under whose roof the death occurs."

In *Kanaran's Case*, 1 Maine, 226, it was held indictable to cast a dead human body into a river. The Court said: "From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and enclosed as the cemeteries of the dead. Hence, before the late statute of Massachusetts was enacted, it was an offence at common law to dig up the bodies of those who had been buried, for the purpose of dissection. It is an outrage upon the public feelings, and torturing to the afflicted relatives of the deceased. If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial, by a disgraceful exposure or disposal of the body, contrary to usages so long sanctioned, and which are so grateful to the wounded hearts of friends and mourners. If a dead body may be thrown into a river, it may be cast into a street; if the body of a child, so the body of an adult, male or female. Good morals, decency, our best feelings, the law of the land, all forbid such proceedings. It is imprudent to weaken the influence of that sentiment which gives solemnity and interest to everything connected with the tomb.

"Our funeral rites and services are adapted to make deep impressions and to produce the best effects. The disposition to perform with all possible solemnity the funeral obsequies of the departed is universal in our country; and even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit. Our legislature, also, has made it an offence in a civil officer to arrest a dead body by any process in his hands against the party while living. It is an affront to a virtuous and decent public, not to be endured."

Cremation is quite common in this country, and the propriety of it seems never to have been questioned in the courts.

The indictability of so disposing of a body as to prevent an inquest is asserted in 1 Bishop on Criminal Law, sect. 468 (6); 2 Ibid. sect. 1188 (2), citing *Reg. v. Stephenson*, 13 Q. B. D. 331.

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 No. 2. — Gray v. Carr, L. R., 6 Q. B. 522.
 

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## DEAD FREIGHT.

No. 1. — McLEAN AND HOPE v. FLEMING.

(H. L. 1871.)

No. 2. — GRAY v. CARR.

(EX. CH. 1871.)

### RULE.

By an express stipulation in a charter-party there may be an express lien for “dead freight,” meaning thereby an unliquidated compensation recoverable by the shipowner from the freighter for deficiency of cargo.

But where goods are shipped under bill of lading referring to the charter-party, it is a question of construction of the bill of lading whether the conditions as to payment of dead freight are incorporated as conditions of delivery under the bill of lading; and if not, the consignees under the bill of lading are not affected by the lien stipulated for by the charter-party.

### McLean and Hope v. Fleming.

L. R., 2 H. L. Sc. 128-138 (s. c. 25 L. T. 317).

The report of this case will be found at length as No. 1 of “Bill of Lading,” 4 R. C. 665.

### Gray v. Carr.

L. R., 6 Q. B. 522-558 (s. c. 40 L. J. Q. B. 257; 25 L. T. 215; 19 W. R. 1173).

*Shipowner's Lien — Charter-party. — Bill of Lading. — Dead Freight and Demurrage.*

The plaintiff, on the 18th of August, 1866, chartered his vessel *Superior* to C., for a voyage from Sulina to London. By the charter-party the ship was to proceed to Sulina, and there load a full cargo of staves <sup>and</sup> or grain, or other lawful merchandise, which the charterer bound himself to ship, and

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 No. 2. — Gray v. Carr, L. R., 6 Q. B. 522, 523.
 

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thence proceed to London, and deliver the same on being paid freight at 8s. per 100 oak staves, and other merchandise, if shipped, in fair proportion; fifty running days to be allowed for loading and ten days on demurrage over and above the said laying days at £8 per day. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibility to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge.

The ship arrived at Sulina, and after considerable delay the loading, as far as it went, was completed on the 5th of January, 1867; and on that day bills of lading were signed by the captain, under protest: "Shipped by C. on the ship *Superior*, of whom W. is captain, now lying on the port of Sulina, and bound to consign his cargo, as per charter-party of 18th of August, 1866, 283,682 oak staves, which are to be delivered at the port of discharge, as per the aforesaid charter-party . . . unto order, or to his or their assigns, he or they paying freight *and all other conditions* or demurrage (if any should be incurred) for the said goods, as per the aforesaid charter-party. (The words "and all other conditions" were added in writing.)

A full and complete cargo was not shipped, and the vessel sailed from Sulina, and performed her voyage with a short cargo. She was also detained at her port of loading during the ten days on demurrage, and also eighteen days beyond the ten days. The cargo was of value sufficient to cover the plaintiff's claims for freight, dead freight, and demurrage.

On the ship's arrival in London, the plaintiff claimed a lien on the cargo for the amount of dead freight, and of demurrage, and for damages for her detention during the eighteen days.

The defendants claimed the cargo as the consignees named in the bills [\* 523] of lading; \* they had no notice until the arrival of the ship in London of the said claim, but a copy of the charter-party had been sent to the defendants with the original bill of lading.

The Court of Queen's Bench held, on the authority of decided cases, that the plaintiff had a right of lien as against the defendants for the ten days demurrage; but not for dead freight, nor for the damages for detention during the eighteen days.

On error by both parties: —

*Held*, by KELLY, C. B., WILLES and BRETT, JJ., and CHANNELL, B., that there was no lien given for damages for short loading under the term "dead freight" in the charter-party.

By BRAMWELL, B. [on the authority of *McLean v. Fleming*, (Law Rep. 2 H. L. Sc. 128)], and CLEASBY, B., that such a lien was given by the charter-party.

*Held*, also, by KELLY, C. B., BRAMWELL, CHANNELL, and CLEASBY, BB., that a lien was given by the charter-party for demurrage proper under the term "demurrage," but not for damages for detention beyond the demurrage days; and that this lien for demurrage at the port of loading was retained by the terms of the bill of lading:

By WILLES and BRETT, JJ., that if a lien was given by the charter-party for demurrage and detention at the port of loading, it was not retained against the defendants by the terms of the bill of lading.

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The whole Court of Exchequer Chamber were therefore agreed that the judgment of the Queen's Bench for the defendants as to the damages for the detention was right; and the judgment of the Queen's Bench was affirmed on the other two points by a majority of four Judges against two.

ERROR from the judgment of the Court of Queen's Bench, on a special case stated without pleadings.

1. The plaintiff is the owner of the ship *Superior*, the defendants are merchants in London, and the consignees of certain timber shipped on board that ship.

2. On the 18th of August, 1866, the plaintiff entered into a charter-party with R. Carnegie, of which the following are the material parts:—

It is this day mutually agreed between N. Gray, managing owner of the ship *Superior*, of the measurement of 689 tons or thereabouts, now at Alexandria, Henry Whitehead, commander, and R. Carnegie, of London, merchant, that the said ship, being tight, staunch, &c., shall with all convenient speed proceed to Sulina, or so near thereunto as she may safely get, and there load as customary from the factors of the said freighter a full and complete cargo of staves <sup>and</sup> grain, seed or stowage goods or lawful merchandise, which the said merchant binds himself to ship, not exceeding what she can reasonably stow: and, being so loaded, \* shall therewith proceed to London, and deliver [\* 524] the same on being paid freight as follows, viz., 8s. per 100 pieces of oak staves 34 36 in. × 4½, 16 in. × 11 14 lines, all French measure; other dimensions in proportion and other merchandise if shipped to pay in full and fair proportion.<sup>1</sup> . . . The cargo to be brought to and taken from alongside at charterer's expense and risk, the ship's boats and crew to render all customary assistance in towing the lighters, &c. . . . The freight to be paid in cash on unloading and right delivery of the cargo; fifty running days, not to count before 15th of October, if required by merchants' agents, are to be allowed the said merchant (if the ship is not sooner despatched) for loading, and to be discharged as fast as ship can put the cargo out, and ten days on demurrage over and above the said laying days at £8 per day; detention by frost not

<sup>1</sup> The charter-party was a printed form; cargo and freight, as they had stood in the above are the clauses as they stood altered in writing. The Court had the original before them; and the clauses as to print, are given in CLEASBY, B.'s, judgment. See L. R., 6 Q. B. at p. 259.



to be reckoned as lay days. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge; should any portion of the cargo be delivered in a heated or damaged condition the freight shall be computed in the usual manner on the bill of lading quantity, or half freight paid on the heated or damaged portion at captain's option, provided no part of the cargo be thrown overboard or otherwise disposed of on the voyage. Cash for ship's use at port of loading, not exceeding £200, to be advanced the master free of interest and commission, and deducted from the freight with insurance. . . .

3. The ship arrived at Sulina on the 14th of October, 1866, and on the 19th of October, 1866, the captain gave notice to Mr. Theophilatus, the charterer's agent at Sulina, that the ship was then ready to receive cargo, and that the lay days were to commence from the 20th of October, 1866.

4. Although the master repeatedly inquired of Theophilatus after the cargo between the 20th of October and the 1st of December, 1866, and required him to load the ship in [\* 525] conformity \* with the charter-party, no cargo was supplied to the ship till the 1st of December, 1866, on which day a number of staves were sent in lighters alongside the ship. The stowing of these staves was at once commenced, and it went on till the 5th of January, 1867, but no cargo was shipped on the ship until the 3rd of December.

5. On the 8th of December, 1866, the master made a protest before the vice-consul at Sulina, declaring, as the fact was, that neither the merchant nor his agent had completed the loading of the ship, notwithstanding the expiry of the lay days on that day, and that the vessel would from that day lie on demurrage on the terms of the charter-party. A copy of this protest was sent to Theophilatus.

6. On the 26th of December, 1866, Theophilatus sent a letter to the master to the effect following: "As your ship is down to the water allowed to cross the bar with, and in consequence you have stopped the work this morning to load the remainder of the cargo in the roads, I beg to notify to you that as customary your ship's time ceases counting henceforward."

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7. The plaintiff contends that it was not customary that a ship's time should cease counting under the circumstances mentioned in the 6th paragraph, but the defendants dispute this contention; and should this circumstance be in the judgment of the Court material to the case, it is to be determined by the arbitrator as hereinafter mentioned.

8. On the 26th of December the ship crossed the bar into the roads, and the loading was there continued till the 5th of January, 1867, on which day the loading and stowing of such cargo as was furnished by the merchant was completed.

9. On the said 5th of January the master signed, under protest (but of which protest the defendants had no notice before the commencement of this action) a set of four bills of lading as follows:—

Shipped in good order and condition by Theologos and Carnegie, in and upon the good ship called the *Superior*, under English flag, whereof is master for this present voyage Henry Whitehead, and now lying in the port of Sulina, and bound to consign his cargo as per charter-party, dated London the 18th of August, 1866, 283,682 oak staves, which are to be delivered in the like good order and condition at the port of discharge as per the aforesaid charter-party . . . \* unto order or to his or their [\* 526] assigns, he or they paying freight *and all other conditions*<sup>1</sup> or demurrage (if any should be incurred) for the said goods as per the aforesaid charter-party. . . .

10. It is to be assumed, for the purposes of this case, that the merchant did not ship a full and complete cargo, and that the ship sailed from Sulina and performed her voyage with a short cargo. The plaintiff claims £364 19s. 5d., as dead freight, for the cargo thus short shipped.

11. The vessel was also detained at her port of loading during the whole of the ten days on demurrage, which, at £8 per day, amounted to £80, and also eighteen days beyond the said ten days. What would be a fair amount of compensation for such detention is still a matter in dispute between the parties, to be referred, in case of necessity, to arbitration as agreed between the parties.

12. The ship arrived in London on the 23rd of March, 1867, and at once commenced unloading.

<sup>1</sup> The words in italics were inserted in writing, the bill of lading being on a printed form.

13. The cargo was of value sufficient to cover the plaintiff's said claims for freight, dead freight, and demurrage.

14. The defendants were the consignees named in the bills of lading and the property in the goods was vested in the defendants upon and by virtue of such consignment. The defendants had no notice until the arrival of the ship in London of the said claims of the plaintiff; but a copy of the charter-party had been sent to the defendants with the original bill of lading.

15. The plaintiff claimed a lien on the goods for the amount of his claims for dead freight and demurrage, and ultimately delivered the goods to the defendants upon the terms that such delivery should not prejudice the plaintiff's claim, if any, to a lien upon the goods for such amounts.

The question for the opinion of the Court was, whether the plaintiff had a lien upon the cargo as against the defendants for the said amounts, or any, and which of them.

On the 26th of January, 1870, the Court of Queen's Bench, on the authority of decided cases, without argument, gave judgment for the plaintiff for £80 for demurrage and for the defendants as to the dead freight and damages for detention beyond the [\* 527] days \* allowed for demurrage. Upon which the plaintiff brought error on the ground that he was entitled to judgment on all three claims; and the defendants also alleged error on the ground that they were entitled to judgment as to the demurrage also.

Nov. 29, 1870. Watkin Williams (A. L. Smith with him), for the plaintiff.

Feb. 1, 1871. Sir G. Honyman, Q. C. (Lanyon with him), for the defendants.

A. L. Smith was heard in reply.

The arguments are fully noticed in the judgments of the Court.

In addition to the cases noticed in the judgments, the following cases were cited: *Oglesby v. Yglesias*, E. B. & E. 930, 27 L. J. Q. B. 356; *Milrain v. Perez*, 3 E. & E. 495, 30 L. J. Q. B. 90; *Pederson v. Lotinga*, 28 L. T. 267; *The Norway*, Bro. & Lush. 226; *Russell v. Niemann*, 17 C. B. (N. S.) 163, 34 L. J. C. P. 10.

*Cur. adv. vult.*

June 15. The following judgments were delivered:—

CLEASBY, B. Gave judgment to the effect that the judgment of

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the Queen's Bench should be affirmed, so far as relates to the demurrage allowed and the claim for detention disallowed. But he considered that the plaintiff was also entitled to the claim for dead freight.

BRETT, J. This is a special case stated in an action [533] in which the plaintiff sued the defendants for dead freight and demurrage. \* The plaintiff was the owner of a ship [\* 534] called the *Superior*. The defendants were merchants in London, and consignees of certain timber shipped on board the ship. The plaintiff had chartered the ship to one Carnegie. By the charter-party the ship was with all convenient speed to sail and proceed to Sulina, and there load from the factors of the freighter a full and complete cargo of staves <sup>and</sup> grain, seed, or stowage goods, or lawful merchandise, which the merchant bound himself to ship, and being so loaded, should therewith proceed to London, and deliver the same on being paid freight (according to certain specified rates). The freight to be paid in cash on unloading and right delivery of the cargo, — fifty running days, not to count before 15th October, if required by merchants' agents, are to be allowed, if the ship is not sooner despatched, for loading; and to be discharged as fast as ship can put the cargo out; and ten days on demurrage over and above the said laying days at £8 per day; the owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. The ship proceeded to Sulina, and loaded a short cargo. The cargo was shipped by the charterer's agents. A bill of lading was signed by the captain for 283,682 staves to be delivered at the port of discharge as per charter-party, unto order or assigns, he or they paying freight, and all other conditions, or demurrage, if any should be incurred, for the said goods as per charter-party. The claim for cargo short shipped (claimed as dead freight) was £364 19s. 5d. The claim for demurrage in respect of the ship being detained ten days on demurrage proper at the port of loading, was £80. And there was a further claim of reasonable damages for eighteen days' detention at the port of loading beyond the ten demurrage days. The defendants were the consignees of the goods named in the bill of lading, and the property in the goods vested in them upon and by virtue of the consign-



ment. The plaintiff claimed a lien on the goods mentioned in the bill of lading for the dead freight and demurrage, and damages in nature of demurrage, which he alleged to be due.

It was argued on behalf of the plaintiff that he would have had by virtue of the charter-party a lien on the goods shipped [\* 535] \* for the dead freight, demurrage, and damages, if the cargo had not been of sufficient value to cover freight and charges, &c.; but as the cargo was of sufficient value, the charterer's responsibility under the charter-party had ceased; and that consequently the bill of lading ought to be construed more favourably for the shipowner, and that the plaintiff had a lien on the goods to be delivered according to the bill of lading, because the bill of lading by reference imposed upon the goods to be delivered under it at the port of discharge the lien from which the charterer was relieved under the charter-party and authorized the plaintiff to exercise that lien in respect of what had occurred at the port of loading against the defendants, the holders at the port of discharge of the bill of lading, and the owners of the goods mentioned in it.

It was contended on behalf of the defendants that the printed words in the charter-party, which were supposed to give a lien for dead freight, had no effect, because no charge for dead freight was stipulated for in the charter-party; that the non-responsibility of the charterer was applicable only to defaults which might occur after the sailing of the ship from the port of loading; that the bill of lading incorporated only such stipulations of the charter-party as were applicable to the goods mentioned in it, and which might take effect in respect of those goods only; and that the claims of the plaintiff in the present action, even though they come within the terms of the charter-party, were not such claims as were imposed on the defendants by the bill of lading.

These arguments raise two questions, namely, first, what is the right construction of the charter-party; and, secondly, what is the right construction of the bill of lading?

As to the charter-party, I am of opinion, in the first place, that it gave no lien to the shipowner for dead freight. It seems to me that a charter-party which leaves damages to be recovered in respect of short loading unspecified, and therefore at large, gives no claim for dead freight properly so called. Such a claim for unliquidated damages is not dead freight: per WILLIAMS and

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WILLES, J.J., in *Pearson v. Goschen*, 17 C. B. (N. S.) 352, 33 L. J. C. P. 265; and, as I have always understood, was intended by Lord ELLENBOROUGH in *Phillips v. Rodie*, 15 East, at p. 555 (13 R. R. 533). I always thought that that great Judge was pointing out \* that, although many people called unascertained damages for not loading a full cargo dead freight, they were wrong. And inasmuch as the charter-party gives an express lien in terms for dead freight only, it is not to be construed as giving it for unliquidated damages for not loading a full and complete cargo. Speaking of a similar claim in respect of pre-paid freight, which was not freight in its ordinary sense, Lord KINGSDOWN laid it down that "where parties, instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist; and that when the contract made gives no lien, the law will not supply one by implication." *Kirchner v. Tenny*, 12 Moo. P. C. at p. 398. And the application of this doctrine to the present case is not affected by the printed clause, which would, if there had been any dead freight stipulated for by the charter-party, have given an absolute lien for it. *Pearson v. Goschen*, 17 C. B. (N. S.) 352, 32 L. J. C. P. 265. That case seems to me, if I may be allowed to say so, rightly, and according to the true mode in which the Courts ought to deal with mercantile business, to point out a necessary and timely modification of the older rule of construction as to giving, if possible, a meaning to every term in the contract, in cases where a modern mercantile instrument is known to be in a printed and general form, with parts of it to be filled up in writing to apply it to particular transactions.

As to the second point argued with regard to the charter-party, namely, that the liability of the charterer, in respect of damages for short loading, and for demurrage, and damages for detaining the ship at the port of loading beyond the demurrage days, ceased on the loading on board the ship of a cargo of sufficient value, and that as a consequence the bill of lading ought to be construed in favour of the shipowner, so as to throw the burden of the lien on the consignee under the bill of lading at the port of discharge. I cannot agree that the second proposition could properly be affirmed, merely because the first were made good. But further,

I do not think that the first proposition is sound. With all respect for the Judges who decided *Bannister v. Breslau*, [\*537] L. R., 2 C. P. 497, I think \*that their interpretation of the charter-party was too severe. The case was decided on demurrer. The Judges relied much on the lien given in respect of demurrage, which they assumed was for delay at the port of loading. But if by other terms of the charter-party than those which were before the Court, demurrage was stipulated for in respect of delay in unloading at the port of discharge, the chief ground on which they based their interpretation would be cut away. I cannot but think that the safer and juster and more correct construction of the clause then and now under discussion is, that it absolves the charterer, when once cargo of sufficient value is on board, from all liabilities, which, but for it, he might incur in respect of anything happening after the sailing of the ship, or, more properly speaking, after the bill of lading is given, as it were, to replace the charter-party.

The next question is, What is the true construction of the bill of lading? Even if the charter-party does give to the shipowner the alleged lien with regard to the alleged dead freight, the demurrage, and damages in nature of demurrage, is such lien imposed upon the goods mentioned in the bill of lading as against the defendants, the owners of such goods, and consignees of them under the bill of lading? The answer, as it seems to me, depends entirely on the construction to be put on the terms of the bill of lading. Upon that construction alone depends the question whether there is any evidence from which a contract between the plaintiff and the defendants to the effect contended for by the plaintiff can be implied. The rule or canon of construction is to be deduced from the cases which have been cited. In *Smith v. Siercking*, 4 E. & B. 945, 24 L. J. Q. B. 257, the action was brought against the consignee at the port of discharge under the bill of lading for demurrage incurred at the port of loading. By the terms of the bill of lading, which was for the whole cargo, the goods were to be delivered in London to order, &c., he or they paying for the said goods as per charter-party. By the charter-party an ascertained sum of £5 per day was stipulated for as demurrage for delay at the ports of loading and discharge; and it was agreed and understood that for the payment of all freight and demurrage the captain should have an absolute lien and

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charge on the cargo. \*The Court of Queen's Bench decided in favour of the defendants (4 E. & B. 945, 24 L. J. Q. B. 257).

And PARKE, B., in affirming that decision in the Court of Error (5 E. & B. at p. 590), said: "In this case you must contend that the consignee at the port of discharge contracted to pay for the antecedent delay of the charterer, which occurred at the port of loading before the consignee had anything to do with either goods or ship. Such a contract is one which requires strong evidence to support it; for it is, to say the least, not a reasonable one."

In *Chappel v. Comfort*, 10 C. B. (N. S.) 802, 810, 31 L. J. C. P. 58, the action was against the indorsees of the bill of lading for demurrage at the port of discharge. By the charter-party sixteen lay days were allowed for loading and unloading, and there was demurrage at £2 per day for any detention beyond that time. By the bill of lading the goods were deliverable to order, "paying freight as per charter-party;" and there was a memorandum written in the margin, "there are eight working days for unloading in London." Upon this memorandum the claim was founded. The Court gave judgment for the defendants. WILLES, J., says, "It may be, and it often does happen that the person who receives the goods intends to pay all the charges mentioned in the charter-party. But when it is intended that such an obligation should be imposed on him, it should be done in plain words, as was done in *Wegener v. Smith*, 15 C. B. 285, 24 L. J. C. P. 25, and other cases, where by the terms of the bill of lading the goods were made deliverable to order 'against payment of the agreed freight and other conditions as per charter-party.'" And at the end of his judgment he says, "There must be a plain intention expressed that the consignee of the bill of lading is to pay demurrage before he can be charged with it. This is an established rule, to which it is highly important to adhere."

So in *Fry v. Chartered Bank of India*, L. R., 1 C. P. 689, the charter-party made the goods deliverable on payment of freight at £3 10s. per ton, the ship to have a lien on cargo for freight. The terms of the bill of lading were "Freight for the said — payable in Liverpool as per charter-party." It was contended that the defendants, \*the holders of the bill of [\*539] lading, were liable for the unpaid freight of the whole cargo. The Court decided against the claim. "The charter-



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party," says ERLE, C. J., "also contains the clause, 'ship to have a lien on the cargo for freight,' and it is said that this entitles the shipowner to a lien on each part of the cargo for the whole freight. I think the judgment of WILLES J., in *Chappel v. Comfort*, applies in terms to this case, and I agree with it, that if it is wished to include more of the terms of the charter-party," — *i. e.*, more than to make the freight payable as per charter-party, — words ought to be introduced into the bill of lading which would show that intention more plainly. The plaintiff's counsel, however, relied strongly on the case of *Wegener v. Smith*. The case, as reported, states that the action was for demurrage, without saying whether for delay at the port of loading or discharge. The charter-party provided for the delivery of the cargo at a certain measurement freight; and in case of detention the captain to be paid £5 for every proveable lay-day. The bill of lading made the goods deliverable to order "against payment of the agreed freight and other conditions as per charter-party." The Court held that by the words "and other conditions," the liability to pay demurrage was incorporated into the bill of lading, and they decided in favour of the plaintiff. This would be a strong case in favour of the present plaintiff if the demurrage therein claimed had been in respect of delay at the commencement of the voyage; "but it has been ascertained on inquiry," says Lord CAMPBELL in *Smith v. Siercking* (4 E. & B. at pp. 951-52, 24 L. J. Q. B. at p. 259), that "the demurrage sued for in that case had accrued in the port of delivery, and had arisen from the default of the defendant in not sooner receiving the goods." And upon the case being again cited in the Court of Error (5 E. & B. at p. 591), JERVIS, C. J., remarked, that "the action was for demurrage accruing from his [the defendant's] own delay in the port of discharge." These remarks were intended to point out that the case is not inconsistent with the doctrine laid down in *Smith v. Siercking*, 4 E. & B. 945, 24 L. J. Q. B. 257, 5 E. & B. 589. The case of [\* 540] *Korn v. Deslandes*, 10 C. B. (N. S.) 205, 30 L. J. C. P. 297, was also relied on. And certainly in its effect was given to a claim for a lien as being introduced from the charter-party into the bill of lading, though the words of the bill of lading were only "he or they paying freight for the said goods as usual." Great stress was laid by the Court in that case on the fact that the defendants, the consignees claiming under the bill

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of lading, were mere agents of the charterers. Unless the decision can be supported on that ground, which it seems unnecessary at present to determine, I think it cannot be supported at all. It is stated with some significance by the learned reporters at the end of the case, that "Error was brought upon this judgment; but the matter was compromised before argument." The rule or canon of construction seems then to be that which is laid down by WILLES, J., in *Chappel v. Comfort*, 10 C. B. (N. S.) 802, 31 L. J. C. P. 58, namely, no liability other than such as naturally attaches in respect of the carriage of the particular goods is to be held to be imposed on a consignee of goods mentioned in a bill of lading, unless such liability is clearly imposed by plain words. Applying that rule to the bill of lading in the present case, it seems to me that we ought not to hold that any liability attached against the defendants in respect of dead freight, demurrage, or damages in the nature of demurrage, incurred at the port of loading. The words, "and all other conditions or demurrage, if any should be incurred," are satisfied by making them applicable to damages in the nature of demurrage for any delay which may occur through the default of the consignee at the port of discharge. Indeed, they are rather apt to such a liability in the present case; because by the charter-party no specified number of lay days is allowed at the port of discharge, and no demurrage strictly so called is provided for. The ship is to be discharged as fast as ship can put the cargo out. The bill of lading may therefore be construed as if the phrase, "conditions or demurrage" were intentionally alternative, that is to say, applicable to a claim which may more properly be called a condition in the nature of demurrage. The proposed construction also gives full value to the words "for the said goods." At all events the bill of lading does not clearly and plainly apply to claims made in respect \* of [\* 541] transactions which occurred before the particular goods were on board, and not in respect of those goods, and which claims, therefore, when made against persons in the position of the defendants, are, to say the least, not reasonable.

I therefore am of opinion that the judgment below ought to have been wholly in favour of the defendants. I think that the part of the judgment which was in favour of the plaintiff for £80 for demurrage ought to be reversed, and the part of the judgment which was in favour of the defendants as to dead freight and damages ought to be affirmed.

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Since this case was argued, and since this judgment was written, our attention has been called to the case of *McLean v. Fleming*, L. R., 2 H. L. Sc. 128 (No. 1 of "Bill of Lading," 4 R. C. 665), in the House of Lords, and if I had thought that that case overruled anything I have said in this I should have willingly bowed to it. But in that case, as I understand the judgment, the charter-party was in respect of the carriage of a uniform cargo, and the freight was payable at a fixed sum per ton, and the charter-party ascertained the amount of the cargo that was to be loaded. It then put upon the charterers the liability of loading a full cargo, and gave a lien to the shipowner for dead freight. Now, under those circumstances it was pointed out by some, if not all of the learned Lords who took part in the judgment, that the damages for not loading a full cargo were, in point of fact, ascertained, because they would be the specified amount per ton upon the quantity that was really ascertained; and if that were so, that would properly be dead freight within the ordinary meaning of the term, and the lien being given in terms for dead freight, that case would be within the recognised rule; and, as I understand their Lordships, they declined to overrule the case of *Kirchner v. Venus*, 12 Moo. P. C. 361, and expressly declined to overrule the case of *Pearson v. Goschen*, 17 C. B. (N. S.) 352, 33 L. J. C. P. 265, which I think is decided on valuable principles that ought to be generally applied. I therefore do not consider that that case overrules what I have said of this charter-party.

With regard to the question on the bill of lading, even although the charter in this case did give a lien for dead freight, [\* 542] it seems to \* me that the authority in the House of Lords leaves the case untouched, because the House of Lords, in the case before it, came to the conclusion that the action was between those who were virtually the charterers and the shipowner, and therefore they decided the case on the charter-party alone, and held only that the fact of bills of lading being given to a charterer cannot alter or affect his liability under the charter-party. They seem to me to have decided the case on the charter-party alone. It therefore seems to me that that case does not affect this case, and I adhere to the judgment which I had already written.

The case seems to me to be one of great importance, because bills of lading are the documents on which goods are bought and

sold before ships arrive, and if the value of the bill of lading is to be dependent on an unascertained amount to be paid in respect of antecedent transactions which cannot be known, any legitimate, in the sense of wholesome, traffic in such a document cannot be undertaken. This consideration leads to the same conclusion as the legal reasoning which has been before applied.

CHANNELL, B. In this case I think the judgment of the Queen's Bench should be affirmed.

The question is, whether the plaintiff, who is a shipowner, has a lien on certain timber carried in his ship, as against the defendants, who are indorsees of a bill of lading relating to the timber, for all or any of three distinct claims.

These claims are, first, £80 for demurrage incurred by the detention of the ship at the port of loading for ten days, during which, according to the terms of the charter-party, the charterer, if he detained the ship, was to pay £8 per day demurrage; secondly a further claim for damages for the ship's detention for a further period of eighteen days beyond the ten days; and thirdly, a claim for what is called dead freight, which is said to be incurred in consequence of a full cargo not having been loaded. It is clear that the plaintiff can only have a lien for any of these claims by express contract, inasmuch as the lien which, as shipowner, he would have independently of any contract would only extend to the actual freight of the goods carried. *Phillips v. Rodie*, 15 East, 547 (13 R. R. 528); *Birley v. Gladstone*, \* 3 M. & S. 205 (15 R. R. 465). Further, although the charter-party may contain an express contract giving him such a lien on the goods as against the charterer, yet he could not have the lien as against the indorsee of a bill of lading, unless it is stipulated for in the bill of lading, either by the incorporation of the clause in the charter-party, or by its being expressly mentioned. The question what lien a shipowner has against the holder of a bill of lading therefore reduces itself into a question of construction, either of the bill of lading alone, or of the bill of lading and the incorporated charter-party combined, as the case may be: see *Wegener v. Smith*, 15 C. B. 285, 24 L. J. C. P. 25; *Smith v. Sieveking*, 4 E. & B. 945, 24 L. J. Q. B. 257, 5 E. & B. 589.

It is important, however, in construing these documents, to consider both the nature of a lien and the nature of the demands in respect of which a lien is claimed. In *Phillips v. Rodie*, the diffi-



culties which would be created by a lien for an uncertain amount are pointed out. Where the amount of the demand in respect of which the lien is claimed is capable of being calculated, the holder of the bill of lading will know what to tender; but where the demand is for unliquidated damages no tender can be made; and therefore, except by some arrangement between the parties, such as was arrived at in the present case, but which could not be possible where the solvency of the holders of the bill of lading was at all doubtful, the goods must be detained until these damages have been ascertained. In the very probable case of the parties as against whom the damages have to be fixed being foreigners, or, indeed, in any case, it is obvious that very considerable delay must take place. In the mean time the goods may deteriorate in value. The greatest inconvenience would therefore be caused by construing the shipowner's lien to extend to unliquidated damages for breach of the charter-party; and although it is not, of course, impossible for the parties to contract for a lien for such damages, unless there was in the contract a very clear expression of their intention to do so, the Court would not so construe the contract.

In the present case both the charter-party and the bill of [\* 544] lading \* mention a lien for "demurrage." I think there can be no question that this extends to the £80 claimed for the ten days during which the charterer detained the ship, as provided for by the charter-party. The plaintiff is therefore entitled to this amount, as decided by the Queen's Bench.

As regards the further detention for eighteen days, the damages for this are not demurrage at all, properly so called. Demurrage is a sum agreed to be paid for the detention of a vessel, and the term is not applicable to the damages caused by detaining her contrary to agreement. I have therefore no doubt at all that the plaintiff is not entitled to any lien for the damages caused by the further detention for eighteen days.

The point of most difficulty in the case is that relating to what is called "dead freight." The charter-party gives the shipowner a lien for "dead freight;" it does not, however, in any other way mention any dead freight, nor does it contain any covenant that full freight shall be paid on all the ship could carry, whether a full cargo is loaded or not. The bill of lading provides that the holder shall pay "freight and all other conditions and demurrage (if any be incurred) for the said goods as per the said charter-

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party." I think this sufficiently incorporates the charter-party to entitle the shipowner to insist as against the defendants on any lien which he would have under the charter-party for what there is called "dead freight:" see *Wegener v. Smith*. The question, however, is, what is the true meaning of the expression "dead freight," so used in the charter-party, and does it cover the claim in the present case, which, as pointed out by Lord ELLENBOROUGH in *Phillips v. Rodie*, is not freight at all, but is unliquidated damages for the loss of the freight? In that case, Lord ELLENBOROUGH says, that in order to give the lien claimed, "the covenant should have been to pay full freight as if the goods had been actually loaded on board, and that the master should have the same lien upon goods actually on board as if the ship had been fully laden with all goods covenanted to be loaded." In the present case, the latter part of the suggested covenant, or something like it, is found, but not the former. It is true that, if we hold that "dead freight" in the charter-party does not include unliquidated damages for loss of \*freight, we give [\*545] no effect to the expression at all. I agree, however, with what was said on this point by WILLIAMS and WILLES, JJ., in *Pearson v. Goschen*, that when these words occur in an ordinary clause in a mercantile contract it is not necessary to find an application for them in the particular case. If the charter-party had provided for any dead freight, strictly so called, being payable, the clause would have taken effect and conferred a lien, but as it is, it does not take effect, because there is nothing for it to apply to. In the case last referred to, the point in the present case was really decided, as the Court held that a clause giving a lien for "dead freight" was wholly inapplicable to a claim for damages in respect to the charterers having failed to load a full cargo. In this Court we should not be bound by that decision if we did not agree with it; but I do agree with it, and adopt the reasoning on which it proceeds.

We have been pressed in the argument with the clause in the charter-party that the charterer's responsibilities are to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at the port of discharge. It has been contended that all the charterer's responsibilities for all breaches of contract were to cease on shipment; and that therefore it must have been intended that there should be a lien on the

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goods, otherwise the shipowner would be without remedy. It is not, of course, necessary for us to decide whether the charterer was or was not relieved from responsibility in respect of the claims which we now decide the shipowner cannot maintain against the defendants. As at present advised, however, I think this clause does not apply. At all events, it contains nothing to induce me to put a different construction on the previous clause than I otherwise should. Probably the charterer's responsibilities which are to cease are the responsibilities in respect of those matters for which a lien is created; but the difficulties in the way of creating a lien for unliquidated damages, and the stipulation that the cargo is to be of sufficient value to cover the freight and charges only, and not the freight charges and all damages, afford a stronger argument for holding that there is no lien and there-

fore no cesser of responsibility of the charterer as re-  
[\* 546] gards the damages, \* than for holding that there is a cesser,

and therefore a lien. A case of *Bannister v. Breslawer*, L. R., 2 C. P. 497, has been quoted in which it was held that under somewhat similar though stronger words in a charter-party, the charterers' responsibility for demurrage did cease. If the demurrage there referred to was demurrage properly so called, then I agree with the decision. If, however, as certainly rather appears to have been the case from the report, it was merely unliquidated damages for detention of the ship, then I think the decision somewhat doubtful, and to be supported, if at all, by the fact that the words as to the cesser of responsibility were stronger there than here. The attention of the Court there does not appear to have been drawn to the fact that the demurrage there claimed was not demurrage, properly so called, but only unliquidated damages, and therefore the opinion of the Judges that a lien was created for this so-called demurrage, is not entitled to the same weight as I should be disposed to give it, if the point had appeared to have been carefully considered. Besides which, it was merely an opinion not absolutely essential to the decision of the case, for although unlikely, it is not impossible, that the parties should so contract as to make the responsibility of the charterer cease, although no lien was effectually created. In such cases where damages have been incurred prior to the shipment, it would be prudent for the master to refuse to sign any bills of lading which did not give express notice to the indorsee of the claim for damages which had accrued, and stipulate for its payment.

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For these reasons, I am of opinion that the judgment of the Queen's Bench should be affirmed on all points.

After the argument of this case, and I had written what I have read as my judgment on the point of dead freight, our attention was called to the case of *McLean v. Fleming*, decided by the House of Lords on the 3rd of April last. The delivery of the judgment of this Court was postponed till we had an opportunity of inquiring into the case of *McLean v. Fleming*. My Brother BRAMWELL considers the decision in the House of Lords governs this case, and must govern him, whatever his opinion otherwise \* would have been. My Brother BRETT, for [\* 547] reasons he has given, considers that *McLean v. Fleming* does not apply. Other of the Judges, including myself, take the same view of the effect of the decision in *McLean v. Fleming*. If I considered the decision of the House of Lords as one which governs the present case, of course I should be bound by it, and should withdraw so much of the judgment respecting the point of dead freight as I had prepared and have read; but thinking that the decision of the House of Lords does not govern the present case, I abide by the opinion that the plaintiff cannot recover his claim for dead freight; and I therefore think the judgment of the Court of Queen's Bench should be affirmed on all points.

BRAMWELL, B.<sup>1</sup> The questions in this case depend on the construction of the bill of lading and charter-party. The former refers to the latter; the captain is "bound to consign his cargo as per charter-party dated London, 18th August, 1866," and payment is to be made as "per the aforesaid charter-party." A copy of this charter-party was sent to the defendants with the original bill of lading. The bill of lading, then, must be construed in connection with the charter-party and the surrounding circumstances, — perhaps, as the bill of lading is negotiable, not all the surrounding circumstances that would be applicable as between charterer and owner; but one, at least, must be borne in mind, viz., that the defendants were consignees of the whole cargo.

This being so, it seems to me that the best way to examine the matter is first to ascertain the meaning of the charter-party. It was said by the plaintiff that the effect of it was, that on the loading of the cargo the responsibility of the charterer ceased; as well for all things future as for those past; and that therefore a right

<sup>1</sup> This judgment was read by WILLES, J.



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must be taken to be given, against the person entitled to receive the goods under the bill of lading, to withhold them till satisfied all claims which otherwise would have been enforced against the charterer. It is not strictly necessary to decide this, perhaps, because it may be that from the form of the bill of lading no right is given against the defendants, although all rights are lost against the charterer; and on the other hand it may be, [\*548] that by the terms of \*the charter-party, rights remain against the charterer, while by those of the bill of lading they are given against the defendants. But the argument is so important, an answer one way to the question would be so cogent in favour of the plaintiff, that it is necessary to consider it minutely. It seems to me that the plaintiff is wrong in his contention on this point. I do not think that the parties intended, nor that they have expressed an intention, that the charterer's responsibilities for causes of action then accrued should be extinguished on shipment. Agreements should be construed on the principle that parties when making them contemplate keeping, not breaking them. I do not think this charter contemplated that the charterer will break his contract. It is true the words "dead freight" are used, which certainly are unmeaning in this case, except they provide for the case of a short cargo contrary to the charter. What meaning, if any, is to be given to them, I shall have to examine presently; but I think they are not sufficient to show that "responsibilities" mean "responsibilities for past breaches of agreement." Again, the charterer's "responsibilities" are to "cease." It is a verbal criticism, but the right words would be "be extinguished" as to accrued claims. Further, they are "to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge." So that it must be of sufficient value to cover the freight and charges. But why should the shipment of a cargo of sufficient value to cover freight and charges extinguish an already incurred claim for short loading, demurrage, and detention over the demurrage days? Again it must be of that value "on arrival at port of discharge." So that if damaged on the voyage to a less value, the other responsibilities would exist. Further, they are to cease on shipment of the cargo, *i.e.*, a full cargo. That is a good reason why the responsibility to ship a full cargo should cease, *viz.*, because it has been done; but why is it a reason why re-

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sponsibility for delay in loading should cease? Why should shipping a short cargo not only be a cause of action in itself, but also keep alive the cause of action for delay in shipping? It is also certain that all breaches of contract by the charterer are not provided for by a remedy against the person entitled under the bill of lading. For if there was no advance at the port of loading, an action would lie \*against the charterer; but [\* 549] clearly there is no lien on the goods for the damages thereby recoverable. Of course that is not decisive; it may have been overlooked. But it is an argument. I am of opinion on this part of the case that the responsibilities which are to cease are those which the shipowner, without loss to himself, may render unnecessary in the case supposed, viz., responsibilities for the freight and charges to cover which the cargo is of sufficient value on arrival at port of discharge. The clause should be read thus: "and on shipment of the cargo, provided it is of sufficient value to cover the freight and charges on arrival at port of discharge, the charterer's responsibilities to cease, for such freight and charges." It is said this opinion is inconsistent with the case of *Bannister v. Breslauer*. If so, I respectfully intimate my doubt of that decision. But it is to be observed that every case such as this, where no general principle of law is involved, but only the meaning of careless and slovenly documents, must depend on its own particular words. I may observe that in one sense this question does not arise. For if the plaintiff is right "the cargo" has not been shipped, but something short of the cargo. However, to help the construction of the bill of lading, the question does arise; but for the reasons I have given, it should, I think, be answered unfavourably to the plaintiff.

Putting this meaning on this part of the charter-party, it is next convenient to examine what lien by the charter-party would be reserved against the party entitled to the goods, whom I will call "consignee." The owners are to have an absolute lien for all freight, dead freight, demurrage, and average. The doubts are as to dead freight and demurrage. First, does dead freight include short loading? In strictness, it does not. Dead freight apparently, in strictness, means some agreed sum, fixed or capable of calculation, for short loading. Now, it is certain that general damages, which are all the plaintiff could recover here, are something very different from that. Here the plaintiff might recover

more than a sum equal to the charter freight for goods carried; or less, if he filled up advantageously elsewhere. Why, then, are these words, which do not naturally signify damages for short loading, to be held to do so in this case? The burthen of [\* 550] showing \*this is on the plaintiff. The argument he uses is, that, unless so interpreted, the words "dead freight" have no application; that a meaning ought to be given to them if they are capable of it; that damages for short loading are often called "dead freight;" that words may be construed in a secondary sense when not applicable in their primary sense; that otherwise no lien is given for dead freight, though the parties intended to give very extensive liens. This argument is, I think, of great force; still its value must be tried and compared with arguments the other way. Those arguments seem to be these: That the parties might have said "damages for short loading" in so many words if they had thought fit; that, as they have not done so, those who have to decide on the charter ought not to say so, without almost a necessity for so doing; that no such necessity exists here; for that, although it is a rule that a meaning should be given to all words if they are capable of one, there is no rule that it must be done in all cases; and that when it is remembered that the forms of these documents are prepared in the same words in print, whatever particular stipulations may be introduced in each, it is more right and more natural to add the words "if any" to all such general words as those in question (as was done in the case of *Cross v. Pagliaro*, L. R., 6 Ex. 9.) than to give any such secondary meaning; for that where a secondary meaning is given to words incapable of their primary meaning the words properly have that secondary meaning, as where "son" is held to mean "illegitimate son" where there is no legitimate son. Further, to suppose that a lien is given for damages for short loading is to suppose that the parties contemplated that the agreement would be broken, not kept, which is a wrong way of construing agreements, as, presumably, parties making them contemplate keeping them. Now, when dead freight is agreed to be paid, the charterer has the right to load a short cargo on paying the dead freight. Another argument against the plaintiff is, that the construction he contends for is inconvenient, that it is not likely a merchant would charter a ship in such terms that he would not be entitled to a bill of lading without the goods in it being liable to a thing so uncertain and open to

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dispute as a claim for short freight; and that, though in this case \* there is but one bill of lading, there might have [\* 551] been several, and the goods in each subject to this claim.

Which of these reasonings should prevail might be matter of much doubt but for the case of *McLean v. Fleming* recently decided in the House of Lords, where a lien for "dead freight," under circumstances very similar to those of this case, was held to give a lien for damages for short loading. *Pearson v. Goschen* is, no doubt, the other way, though certainly there the matter was rather assumed than determined. Anyhow, if it conflicts with *McLean v. Fleming*, of course the latter must prevail.

It remains to consider, as to this point, whether, the shipowner having a right to this lien, that right has been preserved in the bill of lading. But I will first examine what other liens are given by the charter-party. Analogous considerations to the foregoing show, to my mind, that "demurrage" means demurrage strictly so called. In the first place, demurrage, though sometimes used to signify any undue delay in loading, is an expression in common use to signify an agreed time, and is so used in this charter-party. Demurrage proper is contemplated by this charter, and the word therefore is satisfied; so that, if the plaintiff is right, "demurrage" would have two meanings, viz., "demurrage proper," and "damages for detention," which may be at a greater or less rate than the agreed demurrage. In the next place, there is the argument that the parties are not to be taken to contemplate breaking their agreement. In the result, then, I think the charter-party enables the owner to insist on a lien for demurrage strictly so called, but not for delay in loading ultra the demurrage days.

If, then, these are the proper constructions of the charter-party, what is that of the bill of lading? If the master has not reserved the liens he was entitled to, or has stipulated for those to which he was not entitled, why has he? Shortly, the meaning to be expected in the bill of lading is one in conformity with the charter-party. Let us examine it. The goods "are to be delivered unto order or his or their assigns, he or they paying freight and all other conditions or demurrage if any should be incurred for the \* said goods, as per the aforesaid charter-party." [\* 552] It is certainly impossible to speak with confidence as to the meaning to be put on this document. In the first place, the



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word is "or" demurrage. Of course this must be read "and." Then the words are, "if any should be incurred." This means, on the face of it, I suppose, "should thereafter be incurred." But when it is remembered that the charter "per" which this is to be paid makes no provision for demurrage at the port of discharge (and it certainly does not), while it does for demurrage at the port of loading, and when it is remembered how commonly the mistake is made of using the "should" or "shall be" for "shall have been" to comprehend possible past and future, must not this be read as a bit of bad grammar for "if any shall have been incurred"? It seems to me it must be so read, especially when read in conjunction with the words "he or they paying freight, and all other conditions."

These words I now have to consider in reference to the remaining question, viz., is there a lien under the bill of lading for the damages for short loading? But for the words "all other conditions" there clearly would not be. But those words must be read as "performing or satisfying all other conditions" for the said goods as per the aforesaid charter-party: for "paying" conditions is insensible. But if I am right in my construction of the charter-party, one of the conditions the consignee might be required per the charter-party to satisfy in order to have the goods is paying damages for short loading under the name of "dead freight;" for it seems to me that the word "conditions" has no application, unless it is to secure the liens to which the shipowner is entitled by the charter-party. It supposes the performance of some condition precedent or concurrent by the consignee. What? What is he to do by the charter-party? Pay freight? That is expressly provided for. Unload as fast as the ship can put the cargo out? But that is not a condition precedent or concurrent to or with his having the cargo. He may be bound so to unload, but not for "the goods;" for he must have them, whether he unload at that rate or otherwise. Besides, that would only be one condition, and not *conditions*. The clause about heated or damaged condition does not create any condition to be performed, but provides for a way in which, in a certain event, the freight is [\* 553] to be computed. \* It seems to me, then, that by the charter-party there is a right to insert in the bill of lading a lien for the demurrage and dead freight, or damages for short loading; that there is no reason to suppose the captain intended to

give up that right; that there are words sufficient to carry it; that those words have no application unless they have that effect; and that consequently they have that effect, and the plaintiff is entitled to his lien for those damages and demurrage. It is said that the words are "paying for the goods." I think that the words must be read "paying and satisfying all other conditions for the goods;" for "paying conditions" for the goods is insensible. Even then it is argued that the paying and satisfying are to be "*for* the goods," which means "for the carriage of the goods." I do not think so. It means "to have the goods." Demurrage is not paid for the carriage of the goods, but for delay in loading, nor is average; yet, by the bill of lading demurrage and average may have to be paid *for* the goods, which must mean "to have them." *Smith v. Siercking*, is cited to show that those words "for the goods" are to be so understood; and certainly that case tends that way. But *Wegener v. Smith* is an authority the other way. And it seems to me clear that each of those cases must depend on the very words used. Here, again, the argument is used, that if there were several consignees and several bills of lading it would be impossible to construe them in this way; that either there would be liens on small parcels for large damages, or other difficulties would arise. I doubt the difficulty practically. But the question does not arise. There is only one bill of lading. It may be if there were several it would be impossible so to construe them, though I do not think so. But, if so, the conclusion to be drawn is, that in that case the bills of lading would have been differently framed. In this particular case (if such a matter may be noticed) the fact is, that "all other conditions" are inserted in writing in an otherwise printed form obviously for some important purpose; while the clause about demurrage, "if any should be incurred," is in print, and good enough, at the time of printing, to comprehend all demurrage, whether incurred before or after the signing of the bill of lading. \*Sup- [\*554] posing that by the words "demurrage, if any should be incurred," no lien for the demurrage anterior to the bill of lading would be given, I think it would be given by the words "all other conditions." I think those words, for the reasons I have given, would suffice without express mention of demurrage, and I think that express mention does not lessen their effect.

In conclusion, I think the plaintiff entitled to a lien for the

demurrage, and the dead freight or damages for short loading; and that the judgment should be affirmed as to the former, and reversed as to the latter. But I speak with great doubt, seeing the state of the authorities, and knowing the different opinions entertained on the questions, and considering what they are, viz., what meaning is to be put on loose and careless expressions? But I cannot help thinking that if we decide against the plaintiff, he will lose a benefit he clearly meant to have, and the charterers intended he should have. The questions ought to have no importance except to the parties interested, and except as a warning to others not to let them arise again.

WILLES, J. I entirely concur with the judgment delivered by my Brother BRETT, — a judgment written with such fresh and accurate acquaintance with the mercantile and maritime law applicable to the subject, that I will not attempt to add anything.

KELLY, C. B. Three questions arise upon this appeal. One, and the most important, for it governs the entire case, is whether the words interlined in the bill of lading so far incorporate into that instrument the conditions in the charter-party as to entitle the plaintiff to a lien upon the cargo, of which the defendants have become the owners under the indorsement of the bill of lading. The first point is as to demurrage in respect of the ten days from the 8th to the 18th of December, amounting to £80. Under the bill of lading the cargo was to be consigned "as per charter-party," and the cargo is to be delivered "as per charter-party unto order or assigns, he or they paying freight and all other conditions" [these words being interlined in writing in the printed bill of lading] "or demurrage, if any should be incurred for the said goods, as per the aforesaid charter-party." This must be [\* 555] read as paying \*freight and demurrage if any; and the question is, how much of the charter-party is imported into the bill of lading by the words interlined in the bill of lading, "and all other conditions"? These words must be read "performing all other conditions," to make them intelligible and sensible. When we look to the charter-party, we find after the provision for the payment of the freight on unloading, and for fifty lay days from the 15th of October, and ten days on demurrage at £8 per day, the charter-party proceeds thus: "The owners to have an absolute lien on the cargo for all freight, dead freight, demur-

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No. 2. — Gray v. Carr, L. R., 6 Q. B. 555, 556.

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rage, and average, and the charterer's responsibilities to cease upon shipment of the cargo, provided it be of sufficient value to cover the freight and the charges upon arrival at the port of discharge." And the question is, whether this condition is binding upon the defendants under the words "and all other conditions" interlined as before mentioned.

I think it is. First, because these words cannot be treated as words of form and superfluous, or as having no meaning or effect, seeing that they are introduced expressly, and in writing by interlineation in the printed bill of lading, and must, therefore, point to something intended and distinctly agreed upon between the parties; and I see no other condition to which they can apply, but the very important one that the owner was to have a lien upon the cargo for all freight, dead freight, and demurrage.

It has been contended that the words apply only to any condition touching these goods, the freight payable under the bill of lading being the freight only for this shipment; but I think the reasonable interpretation is, that any and every condition is imported which affects in any way the interests of the owner, or of the defendants in relation to the cargo thus consigned. I do not say that notice of the contents of the charter-party would have bound the defendants by this condition, but assuming the words to mean "performing all other conditions," I think the only reasonable effect to be given to them is to preserve to the owner the lien for which he had stipulated upon the cargo consigned to the defendants, which otherwise they would not have been liable to satisfy. It is unnecessary to determine whether, upon the shipment of this cargo, the liability of the charterer and the lien of the owner altogether ceased, as well in respect of demurrage \* already incurred, as of any species of liability that [\* 556] might afterwards arise, for whether such liability wholly or in part continued or ceased, the owner might claim the benefit of his lien against the consignee of the cargo, either as a substituted or an additional or a collateral security for the freight and demurrage. No case has been decided in which the question has turned upon words like these; we must, therefore, decide this case according to what we believe to have been the intention of the parties, to be collected from the language of the two instruments taken together. It is true that, had the two constituted but one contract between the owner and the consignees, it is most un-



likely that the consignees would have allowed their cargo to stand as a security for demurrage already incurred, and not by reason of any act or default of theirs; but we must remember that the charter-party was entered into between the owner and the charterer before it could be known what compensation the owner would become entitled to, whether in respect of freight or demurrage, or any other incident of the adventure. I think, therefore, that the verdict for the plaintiff for £80 ought to stand, and the judgment of the Court of Queen's Bench upon this point should be affirmed.

The next question is, whether the lien extends to the compensation claimed for the detention of the ship after the lapse of ten days on demurrage. Now the words are, "freight, dead freight, demurrage, and average;" and it seems to me impossible that this claim should come within either of these words. I think, therefore, the judgment below must also be affirmed upon this point.

It remains to be considered whether the claim to unliquidated damages for the not having shipped a complete cargo can be claimed as dead freight, and so brought within the lien to which the owner was entitled. Now, inasmuch as we have no means of ascertaining the amount of these damages, except by consent or by the verdict of a jury, they cannot be brought within the strict legal meaning of the term "dead freight," which must be a sum ascertained or ascertainable by the charter-party itself, as where a complete cargo is agreed to be 1000 tons at a specific sum, as 20s.

per ton; and, therefore, the term "dead freight" in this condition must mean the unliquidated damages for not \* shipping a full cargo, or it has no meaning at all with reference to the whole effect of this charter-party. But we often find words in these printed instruments which are so framed and introduced as to be applicable to a great variety of different cases, and which have no application at all, and therefore no meaning and effect whatever, in the particular case in which such a question as this arises. I am far from saying that a different construction is to be put upon words in print and words in writing; but it may be in an instrument of either character, but more especially where it is in a printed form, that a word or term of this description must be read with the implied addition of the words "if any." After all, we are in this case to draw our own inferences as to the meaning of the parties in the use of these words, and if they are doubtful, and there be no evidence on the one side or the other of

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No. 2. — Gray v. Carr, L. R., 6 Q. B. 557. 558.

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their bearing a particular meaning among commercial men, we must put such a construction upon them as we think calculated to give effect to the real intention of the parties: and if they are of a doubtful import, they should have a reasonable interpretation; and it certainly does not seem reasonable that these parties should have agreed upon a lien like this, the effect of which would be, that whenever the cargo becomes deliverable upon the arrival of the ship, it will be impossible for the consignees to satisfy the lien and to obtain possession of their property, unless by agreement between the parties as to the amount of damages claimed by reason of the deficiency of the cargo, a matter upon which they are very unlikely to agree, or by means of the verdict of a jury or the award of an arbitrator, which might not be obtained for months, or even for years, after the arrival of the vessel.

I may add, that if we are to put a strictly literal construction upon these words, a claim to damages by reason of the shipment of a deficient cargo cannot be brought within the true meaning of the word "freight," which imports a sum certain to be paid in respect of the conveyance of goods in a ship, and therefore the term "dead freight," as well observed by Lord ELLENBOROUGH in the case of *Phillips v. Rodie*, 15 East, 547, (13 R. R. 528), cannot be properly used as designating the unliquidated damages recoverable by reason of the breach of a contract to ship a full and complete cargo. And \* this view of the question last [\* 558] raised being supported by the case of *Pearson v. Goschen*, I think that the plaintiff cannot be entitled to a lien for a short shipment, as in this case, under the term "dead freight." I have, indeed, great difficulty in understanding how a lien can exist for a sum of money, not ascertained at the time when the goods upon which the lien is supposed to attach are deliverable according to the contract, nor capable of being ascertained but by the award of an arbitrator or the verdict of a jury. But since this case was argued, we have been informed of the judgment delivered by the House of Lords in a case of *McLean v. Fleming*, L. R., 2 H. L. Sc. 128, No. 1 of "Bill of Lading," 4 R. C. 665), and in which it was held that damages by reason of the shipment of less than a full cargo might be recovered as dead freight, and we are no doubt bound by that decision. In that case, however, the amount of the damages was capable of being at once ascertained, inasmuch as the short shipment was of the specific quantity of 240 tons of bones.

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 Nos. 1. 2. — McLean and Hope v. Fleming; Gray v. Carr. — Notes.
 

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the stipulated freight being 35s. per ton. This is in the nature of dead freight, strictly so called, and is thus distinguishable from the case now before the Court. Upon the whole, therefore, I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

*Judgment affirmed.*

#### ENGLISH NOTES.

The two principal cases above mentioned, and the authorities referred to in the judgments in the former case (see particularly 4 R. C. pp. 669, 674) contain all that can be said upon the interpretation of the term "dead freight." The question considered in the latter case, *Gray v. Carr*, as to what conditions of the charter-party are deemed to be incorporated in the bill of lading by a clause of the latter referring to the charter-party has been raised in a number of cases. As these relate more particularly to demurrage and claims in the nature of demurrage, the cases will be more particularly dealt with hereafter. See No. 10 of "Demurrage" and Notes, 9 R. C. *post*.

#### AMERICAN NOTES.

The principal cases are repeatedly cited in Porter on Bills of Lading, with recognition of their authority, but no analogous American decisions are cited. Hutchinson on Carriers, sect. 478, cites *Gray v. Carr*. In Jones on Liens, sect. 274, both cases are cited.

In *Bartlett v. Caruley*, 6 Duer (New York Superior Ct.), 194, it was held that a freighter who removes goods once shipped can only reclaim them on payment of freight, etc., citing *Tindall v. T aylor*, 4 El. & Bl. 219. But in *Bailey v. Damon*, 3 Gray (Mass.), 92, it was held that the only remedy is indemnity for breach of contract.

In *Giles v. Brig Cyathia*, 1 Peters' Admiralty Decisions, 207, it is said *obiter*, "If a merchant sends the vessel of another for cargo to a designated port and obtains none, he who hired the ship must pay 'empty for full.'" *Kleine v. Catara*, 2 Gallison (U. S. Circ. Ct.), 60, 73.

A very important analogous question has several times been adjudged here on the construction of the following clause in a bill of lading very common on the American lakes and other waters: "All the deficiency in cargo to be paid by the carrier (except when grain is heated or heats in transit) and deducted from the freight, and any excess in cargo to be paid for to the carrier by the consignee." The question is whether this applies to a case where by mistake or otherwise the carrier did not receive the recited quantity, or is limited to cases where he received it and failed to deliver it. The last decision is in *Saryer v. Cleveland Iron M. Co.*, U. S. Circ. Ct. Appeals, Second Circuit, 69 Federal Reporter, 211. The Court observed:—

"Does this mean that deficiency in cargo, however caused, shall be paid by the carrier? Or that such deficiency, be it small or great, shall not be paid by the carrier, when it arises from the circumstance that by mistake in weigh-

## Nos. 1, 2. — McLean and Hope v. Fleming; Gray v. Carr. — Notes.

ing when put on board, the total quantity is stated in the bills of lading as greater than the total quantity actually laden?

“An ordinary bill of lading is not conclusive between the parties as to quantity shipped; it is open to explanation, like any other receipt. A carrier may however agree that he will be bound by the quantity specified, or that the bill of lading shall furnish the only evidence of the quantity. The bill of lading in this case is not in the ordinary form. Probably because of the usual and ordinary variations in quantity, which experience has shown are most frequently to be expected with cargoes of this character between these ports, a clause is added which plainly provides for an adjustment of such deficiency or excess without going back of the face of the bill. Save for the excepted case of grain which is heated or heats in transit, there is nothing in the language used which limits the deficiency or excess so to be adjusted, by the specification of any particular cause. Whether some of it be lost in transit, or whether a change of atmospheric condition increases or diminishes the size of the individual grains, or whether the shape of the measuring receptacles of the individual peculiarities of different weighers produces discrepancies, or whether the carrier drops part of it overboard in the process of landing, or leaves it behind him after delivery from the elevator, or whether the elevator over-delivers to him, — in short, whether the deficiency or excess occurs from the carrier's neglect or without his fault, the language of this bill of lading equally applies to it. Whatever excess he delivers the carrier is to be paid for by the consignee, — *i. e.*, he is to be paid for the excess of grain, not merely for freight on the excess. Whatever deficiency there may be he is to pay for and deduct from the freight, — *i. e.*, he is to pay the value of the grain which is not delivered, not merely to deduct the freight on the undelivered grain. There is nothing in the bill to indicate that this special agreement shall not apply to mistakes in weighing, arising, as this one apparently did, between the warehouseman and the carrier. Neither authority nor the nature of the business calls for any different construction. Similar clauses in bills of lading for similar cargoes have been before the State and Federal courts. In *Meyer v. Peck*, 28 New York, 590, and *Abbe v. Eaton*, 51 New York, 410, it was held that the words ‘deficiency in cargo’ meant ‘deficiency in cargo actually received on board,’ and that the clause did not conclude the carrier from showing that he did not in fact take on board the full quantity stated in the bill of lading. But these cases are shorn of all authority by the latter decision of the Court of Appeals in *Rhodes v. Newhall*, 126 New York, 574. The clause in that case read as follows: ‘All the deficiency in cargo to be paid by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee.’ The Court says: ‘Here the parties have provided by express language for the particular contingency arising under this contract, and we can evade its operation only by disregarding one of the most imperative rules in the interpretation of contracts. . . . It seems reasonable that parties should agree upon the quantity of grain shipped when it is designed for transportation to distant markets, with a view of avoiding controversies between carrier and consignee upon the subject. The cargo was here weighed into the vessel under the supervision and control of the carriers, and



they had every opportunity to learn the actual quantity of grain received by them. They thereupon entered into a contract with the consignor, whereby it was agreed that any deficiency in the cargo should be paid for by them and deducted from the freight, and any excess in quantity should be paid to them by the consignee. The deficiency and excess referred to could have related only to a variation from the quantity specified in the bills of lading, as there was no other standard furnished by which a variation could be estimated. This was a contract which the parties were competent to make, and a consideration for the promise to pay for any deficiency was secured by the right to collect the value of any excess. These were mutual obligations, and were obviously incurred for the purpose of avoiding disputes over the quantity actually received by the carrier, and to estop him from disputing the correctness of his acknowledgment. The parties plainly contemplated the contingency of a variance in the course of transportation between the quantity of grain admitted to have been received by them and that subsequently delivered, and provided in express terms the mode by which their respective rights should be adjusted in that event. The language of the contract is plain and unambiguous, and the right of the parties to make it is indisputable.

In *Merrick v. Certain Wheat*, 3 Federal Reporter, 340, a case decided subsequently to *Abbe v. Eaton*, *supra*, and prior to *Rhodes v. Newhall*, *supra*, the U. S. Circuit Court in the Northern District of New York, Judge Wallace writing the opinion, reached the same conclusion as that expressed in the above quotation. The clause under discussion was identical with that in *Rhodes v. Newhall*. Of it the Circuit Court says: 'On first impression it would certainly seem that the bill of lading would not contain any such stipulation if it was not intended that the deficiency provided for should be that arising from the cargo as represented by the carrier. Otherwise there would be no necessity for inserting the stipulation at all, because the consignee, without any express stipulation, has the right to deduct from the freight a deficiency in the cargo actually received by the carrier and arising from his fault, *Davidson v. Grogan*, 12 East, 381; *Shoe's v. Davies*, 4 Camp, 149; *Edwards v. Toth*, 1 Scammon, Ill., 462; *Leech v. Baldwin*, 5 Watts, Penn., 446; and it is not reasonable to suppose that the parties meant to insert a useless condition in a contract.' Of the contract itself the Court adds: 'It was a contract well calculated to prevent the constant disputes and litigation arising with reference to shortage between carrier and consignee. The carrier has an ample opportunity to guard against mistakes, and so has the shipper; but the consignee is entirely in the dark as to whether the cargo agreed to be delivered has been actually laden, or whether it has disappeared on the trip. It is just that the consignee should pay for what he actually receives, whether more or less in quantity than is expressed in the bill of lading, and it is just that the carrier should be held concluded by his admission as to facts completely within his knowledge and of which the consignee is ignorant.'

In this expression of opinion we entirely concur, and the only question left to be determined is whether the circumstance that in the cases above quoted the controversy was one between carrier and consignee, while in the case at bar it is practically between carrier and consignor, calls for a different

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disposition of the case. It was upon the strength of this distinction that the referee decided against the plaintiff on his claim for deficiency, holding that the contract expressed in the bill of lading did not 'estop the carrier from showing that the principal [the consignor] made a mistake in which the carrier shared.' There is no evidence in the record before this Court tending to show that the consignor made any mistake. So far as appears he was entirely unrepresented, except by the carrier, at the weighing from elevator to propeller at West Superior. Accepting the receipts of the carrier on the bills of lading as correctly representing the cargo laden on board under the carrier's supervision, relying upon their accuracy and on the clause in the contract, he gave up to the warehouseman at the elevator receipts of the latter for a quantity of grain equal to that which the carrier represented that he had received on board. All that is said in the opinion quoted from as to consignee's ignorance as to the actual quantity applies, in such a case as this, to the shipper as well. It seems reasonable that parties should agree upon the quantity of grain shipped when the grain is actually delivered to the carrier, not by the shipper out of his own storehouse, but by an independent warehouseman in another port who delivers it on the shipper's order, and under the supervision and control of the carrier, in the absence of the shipper or his personal representative. As the language of the contract is broad enough to protect the shipper as well as the consignee against the carrier's mistake, there seems to be no good reason for restricting it as the defendant in error contends. The manner in which the carrier is to respond for such deficiency is plainly stated in the clause: 'All the deficiency in cargo to be paid by the carrier and deducted from the freight.' That is, the carrier shall pay cash for the deficiency of grain, and shall deduct from the total freight, as it appears on the bill of lading, the freight of cargo not delivered."

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No. 1. — *Nepean v. Doe d. Knight*, 2 M. & W. 894. — Rule.

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## DEATH (PRESUMPTION OF).

[And see No. 3 of "Administration" and Notes 2 R. C. 91 *et seq.*]

No 1. — *NEPEAN v. DOE d. KNIGHT.*

(EX. CH. 1837. APPEAL FROM *Doe v. Nepean*, K. B.)

No. 2. — *WING v. ANGRAVE.*

(H. L. 1860.)

### RULE.

THE presumption which arises, where a person has not been seen or heard of for seven years, is strictly limited to a presumption of death. No presumption can be made that the person whose death is presumed died at any particular instant during that period. And where several persons are involved in the same calamity, *e.g.*, a shipwreck, there is no presumption, by reason of age or sex, that the one survived the other, or that all died at the same time.

### *Nepean v. Doe d. Knight.*

2 Meeson & Welsby, 894-914 (s. c. 7 L. J. Ex. 335; 2 Smith's Lead. Cas. 8th ed. 584)

#### *Death. — Presumption.*

[894] When a person has been absent seven years without having been heard of, the presumption of law then arises that he is dead; but there is no legal presumption as to the *time* of his death.

By the Statute 3 & 4 Will. IV. c. 27, ss. 2, 3, the doctrine of non-adverse possession is done away with, except, in the cases provided for by s. 15; and an ejectment must be brought within twenty years after the original right of entry of the plaintiff (or of the party under whom he claims) accrued, whatever be the nature of the defendant's possession.

This was an ejectment, commenced in Hilary Term, 1834, to recover possession of copyhold premises in the parish of Loders, in the County of Dorset (being the same premises claimed in the cause of *Doe d. Knight v. Nepean*, 5 B. & Ad. 86; S. C. *nomine*

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No. 1. — *Nepean v. Doe d. Knight*, 2 M. & W. 894–896.

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*Doe d. Slade v. Nepean*, 2 Nev. & M. 219), and was tried before PATTESON, J., at the Dorsetshire \*Spring Assizes, [\* 895] 1835, when the following evidence was given on the part of the plaintiff:—

2d January, 1788. — At a Court held this day for the manor of Loders, Matthew Knight took of the lord certain copyhold tenements called the Roofless Living and Home Living (being part of the premises in question in this cause), to hold to him the said Matthew Knight and Edward Knight (his brother), and Elizabeth Mary Davies, for their lives, and for the life of the longest liver of them, successively.

16th October, 1794. — At a Court held this day, the said Matthew Knight took of the lord a certain copyhold tenement called Mabys Hay (being other part of the premises in question), to hold to him the said Matthew Knight and Rice Davies Knight his son, for their lives, and the life of the longest liver of them, successively, in reversion immediately after the determination of the estate of Henry Budden therein.

20th March, 1797. — At a Court held this day, George Bagster and Nathaniel Taylor, as assignees of the said Matthew Knight, a bankrupt, were admitted tenants to the said tenements called Roofless Living, Home Living, and Mabys Hay, except out of the latter as to one close called Sheep Acres, to which they were admitted tenants in reversion of the said Henry Budden.

At the same Court, George Knight took of the lord the reversion of the said tenements called Roofless Living and Home Living, to hold to Paul Slade Knight (the lessor of the plaintiff) and Thomas Clothier Knight, sons of the said George Knight, for their lives, and the life of the longest liver of them, successively, after the determination of the estate and interest which the said George Knight claimed to have for the life of the said Matthew Knight his brother.

And at the same Court, there was entered a letter of attorney, dated 13th March, 1797, whereby the said \*George [\* 896] Bagster and Nathaniel Taylor appointed Richard Travers their attorney, to take admittance of the said tenements called Roofless Living, Home Living, and Mabys Hay, together with the said close called Sheep Acres, and to surrender the same to the use of the said George Knight, his executors, administrators, and assigns, for the life of the said Matthew Knight.



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No. 1. — *Nepean v. Doe d. Knight*, 2 M. & W. 896, 897.

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In August, 1806, Thomas Clothier Knight died. In December in the same year, or early in 1807, Matthew Knight went to America; and in the month of May, 1807, a letter was received from him, but he was never heard of afterwards.

Matthew Knight was in possession of the premises in question for the three years preceding his bankruptcy, which happened in 1797; and after that event George Knight entered into possession of the same premises as the purchaser of Matthew Knight's interest, and continued in such possession till his death; but he was never actually admitted tenant to the lord.

On the 1st of August, 1807, George Knight executed an indenture of mortgage to the said Richard Travers, of all the said premises, for the term of seventy years if the said Matthew Knight should so long live, for securing the payment of two several sums of £838 and £375. Soon after the date of this mortgage, all the premises were sold to Sir Evan Nepean the father of the defendant in this action (the plaintiff in error), but the purchaser was never admitted tenant to the lord; and if any formal conveyance was executed it had been lost.

On the 12th December, 1807, George Knight died.

On the 6th April, 1808, Sir Evan Nepean granted a lease of the premises to the said Richard Travers for the term of fourteen years from this date, and Travers underlet the premises to George Way, who occupied them from the death of the said George Knight in 1807, to the death of Travers in 1813. Shortly after [\* 897] Travers's death, the \* premises were surrendered by his executors to Sir Evan Nepean, who continued in possession thereof by himself or his tenants, from thence until his death in 1822; and from that time to the present the defendant, Sir Molyneux Nepean, has been in the possession thereof.

Upon these facts, two questions were raised at the trial: first, whether it was incumbent on the lessor of the plaintiff to prove that the said Matthew Knight was actually alive within twenty years next before the commencement of the action; secondly, whether it appeared upon the evidence that there had been an adverse possession of the premises against the lessor of the plaintiff, for twenty years before the action brought. The learned Judge stated his opinion to the jury as to the first point, that it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years, and that he had

No. 1. — *Nepean v. Doe d. Knight*, 2 M. & W. 897-910.

not proved it; and as to the second point, that if Sir Evan Nepean took as purchaser of the interest of George Knight, then his possession had not been adverse for twenty years, because it could not be adverse so long as it was uncertain whether Matthew Knight was alive or dead, which it was up to May, 1814. The jury found that Matthew Knight was not proved to have been actually alive within twenty years next before the commencement of the action, but that it did not appear by the evidence that there had been an adverse possession of twenty years as against the lessor of the plaintiff; and the verdict was thereupon entered for the plaintiff.

The lessor of the plaintiff excepted to the opinion of the learned Judge on the first point, and the defendant to his opinion on the second point, and cross bills of exceptions were tendered and sealed accordingly, and writs of error sued out thereon. The case was argued in last Michaelmas Vacation.

Sir W. W. Follett, for the plaintiff in error.

The Attorney-General, *contra*.

[903]

The Court (Sir W. Follett not being present) called on [908]  
Barstow, in reply. *Cur. adv. ult.*

In Trinity Vacation, the judgment of the Court was delivered by [910]

Lord DENMAN, C. J. The lessor of the plaintiff claimed as grantee in reversion of a copyhold estate, on the death of Matthew Knight. Matthew Knight went to America in December, 1806, or early in 1807, and the last account that was heard of him was by a letter written by him from Charleston, which was received in England in May, 1807. The declaration in this cause was served on the 18th January, 1834. At the trial, evidence was given to show that the defendant came into possession as a purchaser of the interest of George Knight, who held for the life of Matthew Knight.

Two questions arose. First, whether the lessor of the plaintiff was bound to give some evidence as to the precise time of Matthew Knight's death, in order to show that he had brought this action within twenty years of his death, or whether the presumption of his being alive continued to the last moment of the seven years since he was last heard of, when the law presumes that he was dead, and which was within twenty years next before the commencement of the action.

Secondly, whether, on the supposition that the defendant came in as a purchaser of George Knight's interest, there had been twenty years' adverse possession as against the lessor of the plaintiff.

The learned Judge told the jury it was incumbent on [\* 911] \* the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely showing that seven years since he was last heard of expired within twenty years next before the commencement of the action: on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned Judge also told the jury, that if they were of opinion that the defendant took as purchaser of the interest of George Knight, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether Matthew Knight was alive or not, which it was up to May, 1814. Upon this the counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that Matthew Knight was alive within twenty years, but that it did not appear that there was an adverse possession of twenty years; and under the learned Judge's direction, they found their verdict for the lessor of the plaintiff.

It seems the statute of the 3 & 4 Will. IV. c. 27, was not adverted to at the trial, but only on the case being argued before the Court. We are all clearly of opinion that the second and third sections of that Act (which came into operation on the 1st of January, 1834, seventeen days before this action was commenced) have done away with the doctrine of non-adverse possession, and except in cases falling within the fifteenth section of the Act, the question is whether twenty years have elapsed since the right accrued, whatever be the nature of the possession. The right of entry in this case accrued on the death of Matthew Knight. Then, as the first and second questions were identical, the learned Judge was wrong in putting any distinct and separate question to the jury on the nature of the possession, unless the case be within the fifteenth section.

Now, that section applies only where the possession was not adverse, according to the former state of the law, [\* 912] \* at the time of the passing of the Act,—that is, the 24th July, 1833. If that point had been raised at the trial, it

is plain the jury would have been satisfied that the possession was adverse on the 24th July, 1833, for we know by the report of *Doe d. Knight v. Nepean*, that an action had been brought and tried between the same parties some time before that date. Whether, therefore, the learned Judge took a right view of the defendant's possession or not, under the former state of the law, is immaterial; the 3 & 4 Will. IV. c. 27, applies to the case, and the direction in respect of which the defendant's bill of exceptions was tendered was therefore wrong.

Still, it is necessary to determine the first and principal point in the case, because, if the learned Judge's direction was also wrong as to that, the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground. The Court is therefore called on to review the decision of the Court of King's Bench in *Doe v. Nepean*. The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of.

After fully considering the argument at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I. relating to bigamy, more particularly to the Statute 19 Car. II. c. 6, relating to this very matter, the words of which distinctly point at the presumption of the fact of death, but not at the time: it is conformable also to decisions on questions of bigamy and on policies of \* insurance, and it is supported and confirmed by [\* 913] the case of *Rex v. Inhabitants of Harborne*, 2 Ad. & E. 540, 4 Nev. & M. 341. It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death, by proving the absence of Matthew Knight, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the



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 No. 1. — *Nepean v. Doe d. Knight*, 2 M. & W. 913, 914.
 

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lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven \* years [\* 914] commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute, nor is any one authority adduced in which any such rule has been laid down.

It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which the death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench.

No. 2. — *Wing v. Angrave*, 8 H. L. Cas. 183, 184.

that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

For these reasons, we are of opinion that the learned Judge's direction to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is that the verdict found for the lessor of the plaintiff must be set aside, and a *venire de novo* awarded.

*Venire de novo awarded.*

**Wing v. Angrave.**

8 H. L. Cas. 183-224 (s. c. 30 L. J. Ch. 65).

*Death. — Presumption of Survivorship.*

There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause. [183]

Nor is there any presumption of law that all died at the same time.

The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative.

Two persons, husband and wife, made their separate wills. In the husband's will the property was given to his wife, "and in case my wife shall die in my lifetime," then to W. W. in trust for the children on their coming of age, and in case all of them should die under age then to W. W. for his absolute use and benefit. In the wife's will (made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named) the property was given to the husband (subject to interests in the children), "and in case my husband should die in my lifetime," then to W. W. absolutely. The husband and wife and two children perished at sea, being all swept off the deck by one wave, and all disappearing together.

*Held*, that there was no presumption that the husband had survived the wife, or the wife the husband.

*Held also* (Lord CAMPBELL, Lord Chancellor, *diss.*), that on the true construction of the wills, it was necessary for W. W. to show affirmatively that one or other had survived, and that in absence of such proof, the property went to the relatives specifically named in the will of the wife's father, as if there had been no will by the husband, nor any appointment by the wife.

This was a suit instituted by Richard Angrave, the re-

sident, for the purpose of having the trusts of the will \* of [\* 184]

John Tulley carried into execution, under the direction of the Court of Chancery.

John Tulley, by his will, devised and bequeathed all his real and personal estate to trustees, in trust, to convert the same into money; to apply the interest to the maintenance and education of his daughter and only child, Mary Ann, till twenty-one, or marriage, then to pay her £500; then for her separate use, during her life: on her decease, for her children, to vest, as to sons, at twenty-one; as to daughters, at twenty-one, or marriage: if the children should all die before any interest vested in them, "on trust for such person or persons as his said daughter, notwithstanding coverture, by her last will, should direct and appoint, and in default of, or subject to any such direction or appointment, in trust for" his sister, Jane Chart, and his brothers, T. and G. Tulley, and his sister, Mary Tulley.

The testator died on 12th October, 1832, leaving his daughter and Jane Chart, and the others who were to take, in default of appointment, him surviving. This will was operative only as far as personal estate was concerned. In June, 1834, Mary Ann Tulley married John Underwood. There were three children issue of the marriage, a daughter, Catherine, born in 1835, and two sons born in 1838 and 1840. By orders of the Court of Chancery the trust estate, on the death of John Tulley's first executors, became vested in the appellant, William Wing, and the respondent, Richard Angrave.

On the 4th October, 1853, Mary Ann Underwood, by her will, duly made and attested under the power contained in her father's will, appointed all the property she took under that will as follows: "unto, and to the use of my husband, John Under- [\* 185] wood, his heirs, executors, \*administrators and assigns, according to the natures and qualities thereof respectively (subject to the estates and interests of my children therein, under or by virtue of the will of the said John Tulley deceased); and in case my said husband should die in my lifetime, then I devise, bequeath, and appoint the said hereditaments, &c., unto and to the use of William Wing, of No. 163, Bond Street, in the county of Middlesex (meaning the appellant), his heirs, executors, administrators, and assigns, to and for his and their own absolute use and benefit." She named her husband and Wing executors of the will.

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John Underwood, on the same 4th day of October, 1853, duly made his will, and thereby devised and bequeathed the whole of his real and personal estate as follows: "unto and to the use of William Wing of 163 Bond Street, in the county of Middlesex, watchmaker, his heirs, &c., according to the several natures and qualities thereof respectively, upon trust, for my wife, Mary Ann Underwood, her heirs, &c., absolutely; and in case my said wife shall die in my lifetime, then I direct that my said real and personal estate shall be held by my said trustee, upon trust, for my three children, to be equally divided among them, and, in case all of them shall die under the age of twenty-one, being sons, or unmarried, being a daughter, then I give and devise all my real and personal estate unto and to the use of the said William Wing, his heirs, &c., to and for his and their own absolute use and benefit." And he named his wife and the appellant, William Wing, his executrix and executor.

On the 13th day of October, 1853, John Underwood and his wife and their three children, embarked together in the *Dalhousie*, an emigrant ship, bound on a voyage to Australia, and on the 19th day of October following the ship \* was wrecked [\* 186] off Beachey Head, and the father, mother, and three children were all drowned at sea.

Wing proved the wills of both John Underwood and his wife, and Mrs. Underwood, senior, in January, 1854, took out letters of administration to the goods of her granddaughter, Catherine, who was seen alive after her parents had perished. In the same month she filed a bill against Wing, praying for an account of the personal estate of John Underwood, and of the separate personal estate of his wife, and that her own rights as administratrix of Catherine in the residue of the two personal estates might be ascertained and declared. The bill alleged that in the events which had happened no beneficial right in the personal property vested in Wing. The answer was filed in February, 1854, and evidence was taken on the subject of the deaths of Mr. and Mrs. Underwood and their children.

John Reed, the only person who escaped from the wreck, stated that the vessel in which John Underwood and his wife, with their three children, sailed for Australia, foundered in the British Channel, about 16 miles to the southwest of Beachey Head, on the 19th of October, 1853, and that every person on board, except the



witness, perished. That for some time previously to sinking, the ship was lying on starboard beam ends; and that, while so lying, John Underwood and Mary Ann, his wife, and two of the children, namely Frederick and Alfred, were all standing together on the quarter gallery, "I don't believe it was a minute before a sea came and swept them all off; they seemed to go off all at once; I don't think they were separated. I saw no more of them." When struck by a wave, they were carried by such wave over the stern of the vessel into the sea. "They were clasped together in this manner: the boys had hold of the mother, and [\*187] \*the father had his arms round them all; and they were in that state when the sea swept over the vessel; that was the last I saw of them." Catherine Underwood (the other child) was not with her parents and brothers when they were so swept from the vessel; she was lashed by Reed to a spar, but she also perished very shortly afterwards; but he saw her hanging upon the spar, and, as he thought, alive, after he had lost sight of them.

Mr. Wotton, a medical man (examined on the part of the plaintiff), explained the process of drowning. In his opinion, assuming the four persons in question to have been in a continued state of submersion, death would take place in the case of all in two minutes at the outside. Two persons, both in health, being totally submerged at the same moment, asphyxia would ensue in the case of each at the same instant, as nearly as he could conceive. A person of seventy would live as long in such circumstances as a person of thirty, assuming them both to be in health, and a female as long as a male, and a weak man as long as a strong one. After hearing the evidence of Reed, he could not, medically or physiologically, give any opinion whether Mr. or Mrs. Underwood was the survivor; after asphyxia it was possible that some of the vital functions might continue for two minutes, they would not continue longer in the case of a strong than in the case of a weak man, nor in the case of a man than in that of a woman.

Mr. Hancock, another medical man, agreed with these opinions.

Dr. Alfred Swaine Taylor, examined on the part of the defendant, said, that the male, *ceteris paribus*, resisted the asphyxiating cause more than a female; in the case of a simultaneous submersion, the consciousness of the power to swim would operate [\*188] in his favour; that in the case of \*two persons, neither of whom could swim the stronger would have the advan-

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No. 2. — *Wing v. Angrave*, 8 H. L. Cas. 188, 189.

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tage; that assuming two persons of equal strength to be submerged at the same moment, and to undergo total and uninterrupted submersion, they would not die at precisely the same instant of time; that asphyxia might possibly supervene in both at the same instant of time, but asphyxia was not death; the interval between asphyxia and death would depend on the physical strength of the person, varying with sex and age, and healthy and unhealthy state of body. After hearing Reed's evidence read Dr. Taylor said, "I should take the medical presumption to be that the father survived the wife and two boys. That presumption would be increased if the father was a good swimmer, and if the wife was in a sickly state of health; I think that would lead to her sinking without exertion." Mr. Brenton, and Mr. Paget, two other medical witnesses, stated their full concurrence with the opinion of Dr. Taylor. It was proved by witnesses who had known Mr. and Mrs. Underwood, and could speak to their state of health and general habits, that the former had been born in 1810, was a robust, healthy man, and a good swimmer, and the latter who had been born in 1813, was in a weak state of health, and was quite unable to swim.

The appellant insisted, that if John Underwood survived his wife, he, the appellant, was entitled to the trust estate as his legal personal representative; and that if John Underwood died before his wife, then he, the appellant, was entitled to the trust estate as appointee under her said will. The appellant also insisted that the testatrix, Mary Ann Underwood, intended the bequest in his favour to take effect in case the gift in favour of her husband, the said John Underwood, should fail; and that under the circumstances, it was not probable and would be unreasonable to \*presume, that both of them, John Underwood and Mary [\* 189] Ann, his wife, died at the same moment of time, and that it would not be reasonable to presume that they had so died, especially as the effect of so doing would be entirely to defeat the will of the said testatrix, Mary Ann Underwood.

The cause of *Underwood v. Wing* came on to be heard before the MASTER OF THE ROLLS, who in July, 1854, made a decree declaring that the respondents, the Tulleys, were entitled in equal shares to the residuary personal estate of the testator, John Tulley, and accounts were ordered, and farther directions reserved. (19 Beav. 459.)

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This decree was appealed against, and the appeal was heard in February, 1855, by the LORD CHANCELLOR (LORD CRANWORTH), in the presence of Mr. Justice WIGHTMAN and Mr. Baron MARTIN, and the decree was affirmed. (4 De G. M. & G. 633.)

In June, 1855, Mr. Angrave filed his bill against Wing and the Tulleys, praying that the trusts of the will of John Tulley might be declared, and all proper directions given. The cause was heard, and a decree similar to the former was made on the 16th November, 1857. The present appeal was then brought, both the suits being treated as involving the same question, so far as Wing was concerned.

Mr. Roundell Palmer and Mr. Speed for the appellant.

Mr. Follett and Mr. Waller for the respondent.

[197] Feb. 29. The LORD CHANCELLOR (LORD CAMPBELL) after stating the circumstances of the case, said:—

*Primâ facie*, the next of kin, and those who claim in default of appointment, are entitled, and the onus is thrown upon Wing, the appellant, to show a better title. His counsel first attempted to do so under the wills of the wife and the husband, arguing strenuously that there was evidence from which the inference of fact must be drawn, that the husband survived the wife; so that, under her will, the estate vested in her husband, and that the husband's will carried the property to Wing, the children having all died before any interest vested in them. The MASTER OF THE ROLLS and the LORD CHANCELLOR decided that there was not evidence adduced upon which they ought to infer that the husband survived the wife. So far, I think that the judgment was right. This was an issue of fact for their determination.

Reference was made to the Code Napoleon; but, according to our jurisprudence, where the question arises, which of two [\*198] individuals, who perished by the same calamity, \*survived, there is no inference of law from age or sex, and the question is to be decided upon the circumstances proved in each particular case. In the present case, if the question had been tried by a Judge governed by the Code Napoleon, he must have treated it at first as a question of fact, to be decided by the circumstance in evidence, for the incidents of the shipwreck are detailed by an eye-witness, who saw both the husband and the wife carried off by the fatal wave in which they perished. According to the Code Napoleon, “la présomption de survie est déterminée par les cir-

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constance du fait, et à leur défaut, par la force de l'âge ou de sexe." Therefore, till the Judge had come to the conclusion that the circumstances proved established a perfect equipoise, he could not have resorted to the presumption of law, which, in the absence of satisfactory evidence, he is bound to respect. But with us such a question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative.

The appellant certainly did give some evidence, from the different sex, age, and state of health of the husband and wife, upon which, if not counterbalanced, the Judge would have been justified in finding that the husband was the survivor. But there was contrary evidence of a very grave character, and I cannot say that the two Judges erred in declaring that the appellant had not proved satisfactorily that the husband was the survivor, so that under the wife's appointment the property had vested in him.

This being a pure question of fact, I do not think that we can derive any assistance from any of the numerous cases cited where Judges have held evidence to be sufficient or insufficient to satisfy them that one of the two individuals who perished from the same calamity was the \* survivor. Treating this as a [\* 199] pure question of fact, if there had been a clear preponderance of evidence to support the inference that the husband survived, I should not have shrunk from drawing that inference, and now advising your Lordships to decide this question of fact in favour of the appellant. But I can by no means take upon myself to say that the MASTER OF THE ROLLS, and the LORD CHANCELLOR were wrong; I myself should probably have come to the same conclusion. I have entertained a hope that by an improved procedure in Courts of equity such questions of fact might be definitely settled in these courts, either with or without a jury, and that upon questions of law only would an appeal be permitted to this high tribunal.

I need hardly say, that I think there is no foundation for the doctrine, erroneously imputed to the MASTER OF THE ROLLS (for it seems that he never laid it down), where it is left doubtful which of two individuals died first, there is a presumption of law (*juris et de jure*) that they died at the same point of time. I will not say that this is impossible, although *time*, like *matter* is said to be infinitely divisible, but such a presumption is not warranted by decision, by *dictum*, or by analogy.

The counsel for the appellant, secondly, contended that judg-



ment being given against the appellant on his claim under the husband's will, he is entitled, independently of that will, to succeed under the will of the wife, by which it is said that she clearly indicates her intention, that if the appointment in favour of her husband should fail, the appointment in favour of William Wing should take effect. Her language is, "and in case my said husband should die in my lifetime, then I appoint to the use of

William Wing, his heirs, &c., to and for their own absolute use and \*benefit." Is this to be considered merely a bequest to William Wing on the condition of proof being adduced that the husband of the testatrix died in her lifetime? Is this a bequest on the happening of a particular event? If so, the decision against William Wing, the appellant, was right; for he has not proved that this condition was fulfilled, that this event did happen.

But there is a class of cases decided by very eminent Judges, beginning with *Jones v. Westcomb*, Prec. in Ch. 316; 1 Eq. Cas. Ab. 245. before Lord Chancellor HARCOURT, and coming down to *Warren v. Rudall*, 4 K. & J. 603, before Vice-Chancellor PAGE WOOD, which establishes the doctrine that where by a will property is given over, on the failure, in a particular manner, of a prior gift, and the will shows that it was the testator's clear and certain intention that the devisee or legatee over should take on failure of the prior gift, howsoever that gift may fail, the devisee or legatee shall take on failure of the prior gift, although the prior gift fails in a manner different from that specified in the will. These cases are all reviewed and ably commented upon in *Warren v. Rudall* by Vice-Chancellor PAGE WOOD who adds the case of *Cusius v. Coponius*, which was argued by Scævola and Crassus, and is reported by Cicero (Cic. Orat. pro Cæcina, De Orat., Lib. I, c. 29). There the testator, believing that his wife was *enroute*, devised his estate to the child *en ventre sa mère*; and if such child should die within age, then over. The wife never had been *enroute*. This was argued, as the present case has been, to be a bequest on condition, on the happening of a particular event of the child dying within age. But held by the Prætor that the gift over took effect, the prior gift having failed, although not in the manner contemplated by the testator. Asks the reporter, "Quid?

Verbis satis hoc cautum erat? Minimè, Quæ res igitur [\*201] valuit? Voluntas: quæ si tacitis nobis intelligi \*posset,

verbis, omnino, non uteremur: quia non potest, verba reperta sunt; non quæ impedirent, sed quæ indicarent voluntatem."

The cases relied upon by the counsel for the respondent seem to me either consistent with this rule, or cases where the rule was overlooked without being overruled. Of course I fully recognise all the cases where, there being in a will a gift really meant to be on condition, or the happening of a particular event, the Court decided that it could not take effect unless the condition was performed, or the event had happened.

But the present seems to me to be a case of substitution; to take effect on failure of the prior estate. This being an appointment under a power, the will which created the power, and the will in execution of the power, must be taken together, and the limitations may be considered substantially to be first to Mary Ann, the daughter, for life, then to her children, to vest at twenty-one or marriage; in case none of her children should take a vested interest, then to her husband; and in case her husband should not take, then to William Wing. She says, "in case my said husband should die in my lifetime." But his death in her lifetime was the only contingency she contemplated by which the estate given to her husband could possibly fail of taking effect. The only other contingency was that husband and wife should die at the same point of time; and her intention to leave the property to William Wing, failing the gift to her husband taking effect, is to be defeated because she did not say "in case my said husband should die in my lifetime, or in case my said husband and I, the said Mary Ann, the wife of my said husband, should die at the same point of time, or it should be uncertain which of us dies first, whereby my gift to my said husband shall not take effect," then over to William Wing.

\* A Judge is to construe, and not to make a will; and if [\* 202] an event has happened for which a testator has not provided, from not having foreseen it, although if he had foreseen it there is a strong probability that he would have provided for it in one particular way, his supposed wishes shall not prevail, *quod voluit non dixit*: we are to give effect to the expressed, not the conjectural or probable, intention of testators. But looking to this will, does not the testatrix clearly express her intention, that if her husband did not take the property William Wing should take it? The lapse of the bequest to her husband by his predecease

being substantially the only event upon which the bequest to him could fail, when she says, "in case my said husband should die in my lifetime," does she not, in substance, say, in case the bequest to my husband should fail, then William Wing is the object of my bounty, and all shall go to him? She has not provided for the event of there being an impossibility to determine whether she or her husband died first. But although she has not in terms provided for this event, she has clearly intimated her intention, that in case of the gift to her husband not taking effect, the ulterior gift to William Wing should take effect. And this seems to me not to be an interpolation into his will, but a necessary implication from what she has said. How can it be supposed that if she had foreseen the event of an uncertainty as to whether she or her husband died first, so that her husband could not take from that uncertainty, she would have altered the intention she had so plainly expressed in favour of William Wing? Can it be considered possible that William Wing would, in that event, have ceased to be the object of her bounty? What other destination of the property, by her, can be conjectured? If her husband should not

take, William Wing was substituted for him. *Quid?*

[\*203] *Verbis satis hoc tantum est? Minime, \*quæ res igitur valuit? Voluntas.* Words are here found which abundantly indicate the intention of the testatrix. Regard being had to these words, it seems to me to be a fallacy to say that this was a gift merely on the happening of a particular event, unless that event is taken to be the failure of the prior gift to her husband.

It has been objected that there is no proof that the gift to the husband has failed. But with great submission, the failure of this gift is *res judicata*. In this administration suit, to which all who are interested are parties, Wing, as legatee and executor of John Underwood, claimed the property under the appointment by the wife in favour of her husband; that claim has been solemnly overruled on the ground that there is no evidence of the husband having survived the wife; and, moreover, there is a decree in favour of the legatees, who were to take in default of appointment. That decree standing, the claim under the gift to the husband is for ever barred, and it must be considered that no interest in the property in question ever vested in him for the most minute particle of time, or, in other words, that the gift to the husband

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entirely failed. The decree must be considered as containing a declaration to that effect, to justify the adjudication with which the decree concludes: "that those who were to take in default of appointment are absolutely entitled in equal shares to the residuary personal estate of the testator John Tulley."

The gift to the husband having failed, I think that the gift to Wing ought to prevail; this gift having been on failure of the gift to the husband, not conditional on proof being adduced that the gift to the husband failed by lapse.

In this way the appellant's case seems to me to be made out, without any aid from the husband's will. But, taking into consideration that the appellant is legatee under the \* will of the husband, as well as appointee under the will [\* 204] of the wife, and that he is the personal representative both of the husband and the wife, there is another way of putting his case to which I am not aware of any answer that can be given. Indeed this appears to me (with great deference) to amount to a demonstration that the parties to whom the property has been adjudged cannot be entitled to it.

The respondents must admit that they are not entitled, and that the appellant is entitled, first, if the husband survived the wife, under the husband's will; secondly, if the wife survived the husband, under the appointment by the wife; or, thirdly, if the husband and wife died at the same point of time, there being then a clearly established failure of the gift to the husband. In the nature of things, one of these three events must have happened, and in no other way can it be suggested that the deaths of the husband and wife could have occurred. If one of those events must have happened, and on the happening of any one of them the appellant is entitled, how can the parties put into possession of the property be entitled? Their *primâ facie* title is to prevail till a better be shown. But does not the appellant show a better when he proves that he is entitled on the happening of any one of three events, and that, with the certainty of fate itself, one of these three events must have happened?

It has been admitted, and I consider it incontestable, that on proof of the husband and wife having died at the same point of time the gift to the appellant would take effect, that being conclusive to show that the gift to the husband had failed. A technical objection may be made to this last mode of putting the



appellant's case, that it depends upon the accident of his being the legatee and representative of both husband and wife, and that these separate titles might have been in different individuals. But in \*ejectment, separate titles in different individuals are allowed to be joined in the same suit, and the last report of the Common Law Commissioners recommends that this procedure should be extended to other actions.

Upon the whole, I am bound to say, that after great deliberation I have come to the clear conclusion, that the decree appealed against ought to be reversed. However, having reason to believe that a majority of the members of your Lordship's House who heard the argument upon the appeal are of a different opinion, I must of course advise your Lordships, that the appeal should be dismissed.

Lord CRANWORTH:—

My Lords, the question for decision in this case is nearly the same as that which was decided in the Court of Chancery in *Underwood v. Wing*, when I had the honour of holding the Great Seal. If that decision was wrong, the decree of the MASTER OF THE ROLLS, now under review, certainly ought to be reversed. Even if the former was right, the appellant contends that there is a distinction between the two cases which entitles him to a reversal of this decree.

The facts of the case have been so fully detailed by my noble and learned friend on the woolsack, and are so fully before your Lordships, that I need not detain you by adverting to them.

The case of *Underwood v. Wing* was a suit, by the representative of the next of kin of the husband, against Mr. Wing as his personal representative, claiming his residuary personal estate, on the ground that he had died intestate as to that residue; no conflicting claimant was then before the Court. It was argued in that case, that the evidence ought to satisfy the Court that the wife died in the lifetime of her husband, on which event, he by his will [\* 206] gave all \*his property to the present appellant. On that question of fact the MASTER OF THE ROLLS first, and afterwards I, as Lord CHANCELLOR, with the concurrence of two learned Judges, held, without hesitation, that Mr. Wing had failed to establish his proposition, that he had not proved that the wife died in her husband's lifetime. A similar question of fact arose in the present case. But it is needless to say more on the point. Your Lordships, I believe all agree that there is no evidence warranting

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any conclusion as to whether the husband survived the wife, or the wife survived the husband.

Supposing this question of fact to be thus left in uncertainty, and to be incapable of solution, still it was contended before me, in the case of *Underwood v. Wing*, that Wing was entitled, under the husband's will, to the whole of his residuary personal estate, for that, according to the true construction of that will, everything was given to him which from any cause the wife could not take. The wife, it was argued in that case, did not, and could not, take anything; and that being so, and the children having all perished in infancy, the gift to the defendant, Mr. Wing, it was said, must, according to the authorities, be held to have taken effect.

That reasoning did not convince me. There is abundant authority to show that if a bequest is made to A. on one event, and failing that event, on another event to B., then, if the first event does not happen, the Court may understand the testator to have meant that B. should take, though the event on which the bequest is, in terms, made to him is not the exact alternative of that on which it was given to A. It may, if the circumstances warrant it, be understood that the gift to B. was meant to take effect if, from any cause, the gift to A. did not take effect. This as a rule of construction is in some cases not unreasonable, \*and [\*207] has often been acted on. I may refer to the cases of *Jones v. Westcomb*, Prec. in Ch. 316; 1 Eq. Cas. Ab. 245, *Avelyn v. Ward*, 1 Ves. Sen. 420, *Hilbersdon v. Lowe*, 2 Hare, 355, and *Warren v. Rudall*, 4 K. & J. 603, 610, and there are many others. But there is not, so far as I am aware, either principle or authority for saying that if there is a bequest to A., on a particular event, and failing that particular event, to B., that B. can take if it cannot be ascertained whether the event has or has not happened. In such a state of circumstances, there is no more right in B. than in A. The husband here, by his will, said that if his wife died in his lifetime, Wing should take. In all probability he would also, if it had occurred to him, have said, If it cannot be ascertained whether she dies in my lifetime or not, then also Wing shall take; but that he has not said.

On this ground I decided against the claim of Mr. Wing, in *Underwood v. Wing*. It was uncertain in that case whether Mrs. Underwood did or did not die in the lifetime of her husband. If she did, Wing was entitled to his personal estate. If she did not,

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her personal representative was entitled to it. Mr. Underwood's next of kin were, of course *primâ facie* entitled to his personal estate; and as Wing could not displace this title by showing that Mrs. Underwood died in his lifetime, I held, with the MASTER OF THE ROLLS, that there was nothing to displace the *primâ facie* title of the next of kin, represented by the plaintiff in that suit. It was, as I thought, a fallacy to assume that the bequest to Mrs. Underwood had failed to take effect. Undoubtedly it had failed so to take effect as to give to her any practical enjoyment of the property, for, if she was the survivor, she could not have survived for more than a few seconds; but her survivorship, if she did survive but for a second, was sufficient to displace the claim of Wing,

and to entitle her personal representative to the whole personal estate of her husband. The inability \* to ascertain the truth no more assisted the claim of Mr. Wing than that of Mrs. Underwood's personal representative. It was on these grounds that I decided, and with all deference to those who differ from me, I think rightly decided the case of *Underwood v. Wing*.

In the present case, the question arises on the will, or rather testamentary appointment executed by Mrs. Underwood. Under the will of her father, she had an absolute power of appointment over his residuary personal estate, and, in default of appointment, his personal estate was so given, that certain of the defendants in this suit would be entitled to it. In exercise of her power Mrs. Underwood appointed the whole to her husband, but if he should die in her lifetime, then to Wing. In this case, as in that of *Underwood v. Wing*, the counsel for Mr. Wing contended that the gift to him must be considered to have taken effect, because the alternative gift to the husband had failed. On the ground on which my decision rested in the former case, I think that this argument must fail. There is no more reason on such an argument to exclude the claim of the husband's personal representatives, than to exclude the claim of Wing. If Wing contends that he is entitled, because it is not shown that Underwood survived, Underwood's representatives may with equal force contend that they are entitled, because it is not shown that he died in the lifetime of his wife, that is, that he did not survive. Acting, therefore on the principle by which I was guided in the former case, I come to the conclusion that Wing has not established his claim.

In a case so peculiar as that of this shipwreck, the judgment is

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liable to be led astray, from its being certain that both the parents perished almost at the same point of time. But the same question might have arisen if the circumstances had been somewhat different, and if there \*had been no such certainty. [\*209] Suppose, for instance, that Mrs. Underwood had not sailed with her husband and children, but that they having sailed for Australia, she had remained in England, and died there a few weeks after the ship had sailed, and that the ship and all on board had perished on the outward voyage, but that there were no means of ascertaining when, where, or how it perished, surely in such a state of circumstances it could not have been contended that Wing had any title preferable to that of Mr. Underwood's personal representatives. I see nothing to distinguish such a case in principle from that now before your Lordships.

The contest in this case is not, as it was in the case of *Underwood v. Wing*, a contest between Wing and the next of kin of Underwood, but between him and those entitled to Tulley's personal estate in default of appointment. But this does not create any real distinction. In the latter case, as in the former, the question is whether Wing has shown a title displacing the right of those who have a *primâ facie* title; and whether that *primâ facie* title is one conferred by law, like that of next of kin, or one created by the parties, as under the will of Mrs. Underwood's father, can make no real difference.

I may remark, as well with reference to this case as to that of *Underwood v. Wing*, that the rule of construction relied on by the appellant might have been contended to be applicable if the fact had been, and had been ascertained to be, that Mr. and Mrs. Underwood both died at the same instant of time, if that could be possible. In that case the gift to Mrs. Underwood, in *Underwood v. Wing*, would have failed, because she did not survive the testator, her husband. The gift to Wing would not in terms have taken effect, because she did not die in the lifetime of her husband. But the fact being ascertained, that the \*contin- [\*210] gency did not happen on which the wife could take, it might have been argued (I do not say whether successfully or not) that the will ought to be construed as having intended to give to Wing that which the wife would have taken if she had survived; and so, by similar reasoning in this case, that Wing was entitled to what had been appointed to the husband. The facts, however,



on which such an argument would have rested, would have been very different from those on which we are now called on to decide.

The two cases, so far as I have hitherto considered them, are not distinguishable in principle. It was, however, contended that there is a distinction in this case arising from the fact that here we have before us (which the Court had not in *Underwood v. Wing*) the person entitled in either alternative, the person entitled if Mr. Underwood survived his wife, and the person entitled if she died in his lifetime. Wing is the personal representative of Mr. Underwood, and in that character is entitled if he survived his wife. If he did not survive, then Wing is entitled in his own right.

I have considered this distinction, but I do not think that it warrants us in arriving at any different result. Suppose the fact had been that some third person had been Mr. Underwood's personal representative, it could not surely have been contended that though neither he nor Wing could separately have established a claim, yet that they might club their rights together and say that one or other of them was entitled. Lord ELDON, on the demurrer in *Cholmondeley v. Clinton*, Turn. & Russ. 116, and Lord REDESDALE in this House (4 Bligh, 81; 22 R. R. 83), evidently considered such a course as inadmissible, and it is certainly contrary to all principle. Can it, then, make any difference that here the two rights are

united in the same person? I think not. They are rights  
[\* 211] \* of a totally different nature. In one view of the case

Wing would take for his own sole benefit, whereas in the other he would take only to distribute according to Mr. Underwood's will, after paying his debts. The persons claiming in default of appointment are entitled to hold the property till some one can show an appointment in his favour. Wing cannot show an appointment to him personally. He cannot show an appointment to Underwood, alone, whom he represents. It cannot be that the mere character of executor gives any right to Wing, for then he would be entitled, even though the beneficial interest was all given to another. It cannot be that his right results from his being residuary legatee, for he might have filled that character though another had been executor. And if he could not, for the purpose of this suit, connect either of these rights separately with his personal claim as appointee, so neither can he rely on the union of both of them in his own person. Justice cannot be done by handing over the funds to him on the ground that he unites in

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himself both claims. It is impossible to know how he is to dispose of the property when he has got it. The persons entitled in default of appointment are to be treated as persons in possession, and they are not to be dispossessed unless by some one showing how and in what right he has a superior claim. The union of the two rights in Wing does not enable him to do this; if indeed, the same person was entitled for his own benefit, whichever of the events had happened, this argument of the appellant would have been good. If, for instance, the appointment had been in one event to Wing, in the other to the person who at the death of the person appointing filled a particular office, say that of Lord Mayor of London, then if Wing was at that time Lord Mayor of London he would be entitled, *quacunq; via*, and his title would be good. But then it would \*be certain that in every possible [\*212] event Wing must be entitled for his own use and benefit.

If it be said that, in the circumstances of this case, it certainly was not intended that those entitled in default of appointment should retain the property, I answer it was intended that they should retain it till some other person could show a valid appointment in his favour; and this is not shown. I do not, therefore, see any valid distinction arising from the accident that here Wing claims, not only in his own right, but also as executor and residuary legatee of Mrs. Underwood. They are two distinct and inconsistent rights incapable of being joined together. The result, therefore, is, that I think the decree below was right, and I must, therefore, recommend your Lordships to affirm it, though of course I cannot but feel, to some extent, diffident of my own opinion, opposed as it is to that of my noble and learned friend.

My Lords, I have this morning received a note from my noble and learned friend, Lord BROUGHAM, who was obliged to quit England in the course of this morning, and he authorizes me to say, that having done me the favour to look at what I had written, and also at the learned and elaborate judgment of the LORD CHANCELLOR, he concurs in the view which I have had the honour to submit to your Lordships.

LORD WENSLEYDALE, after stating the two wills, the facts set forth in evidence, the suits and the proceedings in the Courts below, said: —

I think, after much consideration, that the view taken of the case by the MASTER OF THE ROLLS, agreeing with that taken by

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LORD CRANWORTH in the other case of *Underwood v. Wing*, is right.

Three questions were discussed in the arguments before [\* 213] \* us. First, whether the burthen of proof that he was entitled, lay upon the appellant. This point was not much pressed, and there is not the least doubt that the appellant was bound to show that he had a right according to the true construction of the will under which he claimed. The *onus probandi* was clearly upon him. Secondly, it was contended that there was evidence of the death of the wife in the lifetime of her husband, so as to entitle the appellant, under the will of Mrs. Underwood, supposing that upon the true construction of that will it was necessary to prove that fact. The question is not whether there was evidence to go to a jury, if there had been an issue, and the question had been left to them whether the husband survived. The question for us is, whether, upon the written evidence on which the Judges themselves are to decide, according to the present defective mode of trying disputed facts in Chancery, they ought to come to that conclusion. And considering that the MASTER OF THE ROLLS, LORD CRANWORTH, and the Judges, Mr. Justice WIGHTMAN and Mr. Baron MARTIN, are all of opinion that they ought not, I think we should accede to that opinion, unless convinced to the contrary. And I must say, that far from disagreeing with these learned persons, I think they have come to a perfectly just conclusion. The evidence leaves it in total uncertainty whether the husband died before or after the wife, or whether they both died at the same instant. Whoever has to maintain any one of these propositions, must certainly fail. And this disposes of the case, if the clause in each will should be construed according to its strict grammatical construction. The appellant would be entitled, under Mrs. Underwood's will, only in the event that the husband died in the lifetime of the wife; and under Mr. Under- [\* 214] wood's will only if the wife \* died in the lifetime of the husband, but under neither if they died at the same instant.

But then it is contended (and the argument was principally directed to that point), that according to the true construction of the two wills, the conditional limitations could be construed as taking effect, not merely in the events expressly mentioned respectively, but in the event of the husband and wife dying at the same moment. If there was simply a contract to give a sum of money

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to any one, on condition that A. died in the lifetime of B., I think it never could be held that the person to whom the promise was made could recover, unless he proved that the precise event happened; and if he left it uncertain whether both did not die at the same moment of time, I think it perfectly clear that he would not succeed.

But it was contended, that in a conditional limitation in a will which may be supposed to be meant to dispose of the whole of the testator's property, the context would enable me to depart from the grammatical construction of the words, and to read them as intending to provide, not merely for the case of the legatees dying in the lifetime of the testatrix, but dying at the same time, as if the words had been "if the legatee shall not survive," or in other words, "if the previous legacy shall lapse," then over. I was very much struck with that argument, and certainly was inclined for a time to think that the will of Mrs. Underwood (and that of Mr. Underwood is open to the same consideration) might be construed as providing for the lapse of the legacy to her husband, by his not surviving her. But, after much consideration, I think this construction ought not to be put upon it. This case (and there are many like it) is one in which the temptation from the supposed hardship of the case to swerve from the established rules of \* construction, is strong. No one can [\*215] doubt as to the testatrix's "intention," in the loose sense of that word. No one can suppose that she really meant not to give the property to Wing, if her husband and herself should happen to die at the same moment. No one doubts, that, had she thought of such a possibility at the time she made her will, she would have provided for it by express words. But it cannot be too often repeated, that the true question in all these cases, is, not what the testatrix *intended to do*, but what is the meaning of the words used in the will. Sir James Wigram says, in his excellent work on the application of parol evidence (4th Ed. p. 8, s. 9), "It is not what the testator meant, but what is the meaning of his words." Those ought to be construed according to the rule now fully established. The will is to be read in the ordinary and grammatical sense of the words, unless that is contrary to or inconsistent with the declared intention of the writer, to be extracted from the whole instrument, or unless it involves any absurdity; in which cases it may be modified, extended, or abridged, so as to avoid such inconvenience, but no farther.



This rule, in substance, has been laid down by Mr. Justice BURTON, and before him, in the strongest terms, as a rule of the greatest importance, by Lord ELLENBOROUGH, and since by Lord CRANWORTH, by Mr. Justice MAULE, and by Chief Justice JERVIS, as will be found in the report of the case of *Abbott v. Middleton*, 7 H. L. Cas. 68.

It is impossible to overrate the importance of steadily and faithfully adhering to this rule, for the sake of the great interests of society in avoiding litigation, and affording the best chance of obtaining as much certainty in the construction of wills as [\*216] the subject is capable of. It is better, \*as Mr. FEARNE says (FEARNE'S POSTHUMOUS WORKS, p. 173), that the intentions of twenty testators every week should fail of effect, than that the rules should be departed from upon which the security of titles, and the general enjoyment of property so essentially depend. Adhering to this rule, I do not see how any different reading can be adopted in the will of Mrs. Underwood. The words themselves are perfectly plain and clear. If the words were read in their ordinary sense, there would be an intestacy in the possible event of the contemporaneous death of the testatrix and her husband. There is no inconsistency, or repugnance, or absurdity in so construing them. But I cannot think, that the mere circumstance of intestacy in the supposed event of contemporaneous death can alone be sufficient to alter the construction of the clear words of this clause. The more reasonable inference is that the testatrix omitted altogether to consider the supposed case of contemporaneous death, and that it is therefore unprovided for. And I do not think that the decision in the case of *Jones v. Westcomb*, Prec. in Ch. 316; 1 Eq. Cas. Abr. 245, pl. 10, before Lord Chancellor HARCOURT, and many subsequent cases, referred to at your Lordship's Bar, and which have been commented upon by my noble and learned friend on the woolsack, where, from the words used, the Court has seen that the intention was that the limitation over was to take effect on failure of the precedent estate, are any authority for altering the express words of condition on which the limitation over depends. In the case of bequest to a supposed child in *rente su mère*, and there is no child, the gift fails from the want of a person to take it, and the gift over takes effect; if there had been a child the gift over would not have taken effect unless the precedent condition of that child dying under twenty-one had taken place. The

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condition does not really exist till after the \* child is born. [\* 217] A similar reason applies to other cases of posthumous children. It applies to *Acelyn v. Ward*, where the gift of the first estate failed by the death of the devisee in the testator's lifetime. And so in the case of *Warren v. Rudall*, 4 K. & J. 603, before Vice-Chancellor WOOD, where the first limitation failed because it was void in law.

To other cases the mode of reasoning adopted by Sir WILLIAM GRANT in *Murray v. Jones*, 2 Ves. & Bea. 313, (13 R. R. 104) applies. He there points out that words at first sight conditional are really not so; as a gift "in case I have only one child," does not necessarily mean that the having *one* child was a condition precedent. None of those cases so understood applies to the present, where the words used are expressly conditional and perfectly clear and unambiguous.

All that can be truly said in this case is, that it is singular that the testatrix should have made the limitation over depend upon that precise event. The words used, however, imply no more; and though we cannot but conjecture that the testatrix might have intended to provide for every case of lapse by death, she certainly has not done so. I am quite satisfied, therefore, that the proposed construction cannot be adopted consistently with the preservation of the established rules of law.

But supposing the construction suggested should be adopted and the will read as if it had provided for the gift over "in case the husband should not survive," or "in case the legacy to him should lapse," it would not, in my mind, remove the difficulty. In the case of the claim under Mrs. Underwood's will, the appellant could not prove that Mr. Underwood did not survive, and that there was a lapse. In the claim as executor of Mr. Underwood, he could not prove that the wife did not survive, and that

\* there was a lapse, and therefore in each character he [\* 218] would fail.

The circumstance of the family all perishing in the same shipwreck is only one case in which such difficulties would arise. If the husband had gone abroad, and not been heard of for seven years; if the wife had done so, and not been heard of for the like time, or had died at a known time at home, just the same difficulty would have occurred. If either had died at a certain time, and the other at a time not known, it would have been equally impos-

sible to ascertain whether either or which gift over had taken effect.

In this case it is contended that the difficulty is removed by the circumstance that the claimant under both wills is the same person. I think not. If the representative of Mr. Underwood were a different person from Wing, one of the two would be entitled without doubt, for Mr. and Mrs. Underwood must have died one before the other, or both must have died simultaneously. It might therefore be contended that Mrs. Underwood's will must have been an effective execution of the power, as one or the other must have taken under her will, and the legatees over could not take. But I apprehend it to be clear that this would not have been sufficient to defeat the title of the legatees over. To do that it would be necessary to show not merely that one or the other, but *which* of the two, was entitled to take the property appointed. The Court must be able to say to whom it is bound to give the property as legatee, in priority to the legatees over. Both such claimants could not defeat the title of the ultimate legatees by joining their claims together, each claiming under a different right. The case of *Holmondely v. Clinton*, Turn. & Russ. 107, shows very clearly [\* 219] \* that Lord ELDON thought that two persons, each asserting the title to be in him, could not join in one suit for the property. He says, "It is a record quite singular, and quite different from any I ever recollect, that two persons can come into this Court, and say the title is either in me or you, each contending it is in himself, and bring before the Court a defendant." And this is quite analogous to proceedings at law. If an action for a legacy could be maintained, and one was brought for a legacy, subject to the like condition, both could not join in the same action. Each must have brought his own action. And under the circumstances of this case, neither being able to prove his right, both must fail.

But does the circumstance that in the present case the appellant happens to fill both characters, make a difference? He claims as legatee of Mrs. Underwood if she survived, as executor of Mr. Underwood and legatee if he survived. In one case he would take the property absolutely, in the other in his representative character, subject to the debts of Mr. Underwood. Must he not make out his claim to the fund in Court in one character or the other, and distinctly show in which he was entitled? Is it not substantially a claim by Wing and by the creditors of Mr. Underwood

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and his legatee whom the executor represents? Before the probate was obtained the claim was by two sets of claimants. By the fact of obtaining probate subsequently, is the claim made a single one?

If we pursue the analogy before mentioned, and suppose that a legatee could maintain an action for a legacy, undoubtedly he would in that case have to bring two different actions, one in his own right as legatee, and another as executor to Underwood, and to show his title in both those actions according to the nature of the action. I should think that he would be compelled to show distinctly in \*this proceeding in which character [\* 220] he claimed the fund in Court, which the Court is called upon to distribute by its decree. This he could not possibly do, as the evidence leaves the claim in either character in total uncertainty. But, after considerable inquiry, I do not find any authority upon this precise point either way; I cannot, therefore, entirely rely upon this view of the case, but I am very strongly inclined to think that it is perfectly correct. But on the first ground stated, that the strict grammatical construction of the conditional limitation cannot be departed from, I think the decree ought to be affirmed. And on the latter ground, also, I strongly incline to think that it ought to be affirmed.

Lord CHELMSFORD:—

My Lords, I agree in the opinion which has been expressed by my two noble and learned friends who last addressed your Lordships' house, and which is concurred in by my noble and learned friend Lord BROUGHAM. With respect to the question, upon the fact of survivorship when two persons are swept away together by a calamity like that which happened in this case, it is possible that there may be evidence to prove distinctly which was the survivor, as where one of them has been seen struggling with the waves after the other has sunk, and never again appeared above the surface, or, as in this very case, where there can be no doubt that there is evidence to establish satisfactorily that Catherine, the eldest daughter, survived her parents for some short time, though she afterwards perished in the same shipwreck. But where two persons are at one and the same instant washed into the sea and disappear together, and are never seen any more, it is not possible for any tribunal called upon judicially to determine the question of survivorship, to form any judgment upon \*the [\* 221] subject which can be founded upon anything but mere



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conjecture derived from the age, sex, constitution, or strength of body or mind of each individual, and as our law has not established any rules of presumption for these rare and extraordinary occasions, the uncertainty in which they are involved leaves no greater weight on one side or the other to incline the balance of evidence either way. If, therefore, it is necessary that the appellant to establish his claim under the will of Mrs. Underwood should prove that she survived her husband, he must altogether fail.

Now, whether this proof is essential must be gathered from the intention of Mrs. Underwood, as expressed in her will. Did she intend that the appellant should have the property in any event by which her husband might become incapable of enjoying it; or did she mean to impose it as a condition of the gift to him that her husband should die in her lifetime? There seems to be little difficulty in replying to these questions, that she probably intended Mr. Wing to take, upon the failure, in any manner, of the bequest to her husband, but that, not contemplating any state of circumstances in which that bequest would become inoperative, except by his dying in her lifetime, she used that form of expression to indicate that Mr. Wing was, in that event, to be substituted for her husband. Had it occurred to her mind that a highly improbable state of facts might arise, either of their both perishing together, or of its being impossible to ascertain which was the survivor, no doubt she would have used apt words to embrace such an extraordinary contingency. Can the language which she has employed be made to include such an intention? If it cannot, then we are not at liberty to go out of the will to bring into it something which is not to be found there. The testatrix says, I give to my husband certain property, and in case he should die in my lifetime, [\*222] then to the \*appellant. She clearly intended that the appellant should not have her property if her husband survived her, for on that event it was to go to him. The appellant can only be entitled in case the husband fails to take by survivorship. If the husband survived, the appellant's bequest never came into existence. But he cannot show that the husband did not survive, and therefore he fails altogether in establishing the foundation upon which alone his right can be built.

This is one of those cases in which a strong temptation is presented to the Judge to strain the construction in order to reach a presumable and probable intention. The appellant was no doubt

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intended by both husband and wife to take the property in the event, in either case of the one not surviving the other. And if both of them had been asked what should become of the property in the event of their simultaneous death, or a total inability to establish the survivorship of either, it may be taken for granted that their answers would have been in favour of the appellant. But the stronger the wish to give to the appellant what he has been deprived of merely by an accident, the more ought the judgment to be guarded against the danger of forcing a construction upon the will, in order to prevent a conjectural intention from being defeated.

None of the decisions which were cited in the course of the argument meets the present case, nor does any one of them determine that where a gift is made to A. on a given event, and failing that went to B., and the gift to A. "is out of the case" (to use Lord HARDWICKE'S expression in *Aclyn v. Ward*) on account of the inability to show that the event has occurred, the gift to B. shall take effect.

But it is said that the right of the appellant, under the present will, has been judicially determined in his favour by the decision in the case of *Underwood v. Wing*, upon the \* will [\*223] of Mr. Underwood. Upon this it is to be observed that if it can be collected from the will in question, that it was intended that the appellant should take, however the preceding gift failed, the bequest to him does not require any foreign aid, either by judicial decision or extrinsic evidence. But if, as I have already stated my opinion to be, the only intention indicated by the will is, that the gift to the appellant was to be dependent upon the husband's dying in his wife's lifetime, then the decision in *Underwood v. Wing* cannot help him, because it did not proceed upon the ground that there was proof that Mr. Underwood did not survive his wife, but that there was no evidence to show which of them was the survivor.

It has been proposed also, to place the wills of Mr. and Mrs. Underwood together, and to contend, that as under the two, Mr. Wing would have been entitled, whichever of them was the survivor, therefore it is immaterial to the decision of this case whether he proves that Mrs. Underwood survived her husband or not. But it is difficult to understand upon what principle the wills of Mr. and Mrs. Underwood can be taken together for the purpose of

interpretation. If different persons had been entitled under the two wills, each must have established his claim solely by the will in his favour, independently of the other, and no difference can be made in the rules of evidence, because the appellant accidentally happens to be the ultimate legatee in both wills.

In forming my judgment upon this case, I have had to struggle with my strong inclinations so to construe the will as to give the appellant the benefit under it, of which he has been deprived by a singular and unforeseen accident. I would gladly have found anything which either expressly or by necessary implication manifested an intention that he should take at all events upon [\*224] the failure of the gift to \*Mr. Underwood. But it must

be conceded, that the event which happened was so extraordinary and improbable, that it was not likely to have occurred to the mind of any one, and therefore no provision for it could have been contemplated. We may, indeed, speculate with great probability, if not with certainty, as to what the form of the bequest would have been if the possibility of such an event had been suggested, but to act upon such a speculation would be to make the will speak a different language for the purpose of satisfying an intention which could not have been conceived, and, therefore, could never have been meant to be expressed. It is with very great reluctance that I feel myself compelled to differ with the judgment of my noble and learned friend the LORD CHANCELLOR, and to arrive at the conclusion that the decree ought to be affirmed.

*Decree affirmed, and appeal dismissed with costs.*

Lords' Journals, 29 February, 1860.

#### ENGLISH NOTES.

*Dunn v. Snowden* (1863), 2 Dr. & Sm. 201, 32 L. J. Ch. 104, 7 L. T. 558, 11 W. R. 160, was a decision of Vice-Chancellor KINDERSLEY, afterwards overruled as will be seen, but here mentioned by way of illustration. A testator died on 12 May, 1851. William Snowden, a legatee under his will, was last seen at Newcastle on 1st Jan. 1848, at which time he was unmarried. The executors of the will had advertised for him without effect. The Chief Clerk reported that William Snowden must be presumed to have died unmarried, and to have survived the testator. The question was argued on the part of the next of kin of William Snowden and the next of kin of the testator, the execu-

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tors of the testator being also represented. Vice-Chancellor KINDERSLEY held that the conclusion of the Chief Clerk was right: and that the representatives of William Snowden were entitled to the legacy. This decision was followed by Vice-Chancellor MALINS in *Re Benham's Trust* (1866), L. J. R., 4 Eq. 416, 36 L. J. Ch. 502, where the evidence was somewhat similar. The legatee, Thomas Davis, left the place where he had been residing for several years (his wife remaining there) in June, 1854, and had not been heard of at the date of the application, in 1867. The question was whether he had survived the testator, who died on the 29 August, 1860. Vice-Chancellor MALINS ordered payment out of the legacy to the brother (being the sole next of kin and administrator) of Thomas Davis. On the question coming on appeal before ROLT, L. J., that distinguished (but short lived) Lord Justice directed further inquiries, expressing an opinion that the case was one for proof, not for presumption. "The death of Thomas Davis might be presumed at the end of seven years; but the question when he died during the seven years was one of fact. The Court, in order to come to a decision on such a point, must have evidence as to the age of Davis, and as to the character of the inquiries made after him. In the absence of any evidence on the point, the case was not ripe for decision. The VICE-CHANCELLOR's order must be discharged." *In re Benham's Trust* (1867), 37 L. J. Ch. 265.

A sailor left his ship at the end of the year 1849, and in 1864 had not been heard of since. It was held that if he was shown to have intended to desert, it could not be presumed that he was dead in May, 1850; but that, if he had intended to return to his ship, the Court would assume that he met with some accident by which he perished a short time after leaving the vessel, and before May, 1850. *Lakin v. Lakin* (1865), 34 Beav. 443.

*In re Greene's Settlement* (1866), L. R., 1 Eq. 283, 35 L. J. Ch. 252, was a decision of Vice-Chancellor WOOD (afterwards Lord HATHERLEY). In that case the ultimate trust of a fund under a marriage settlement, in events which happened of no child living to attain 21, and the wife surviving the husband, was for the wife absolutely. The facts were that, in the Indian Mutiny in 1857, the husband was killed on the 3rd of June, the wife, Mrs. Greene, escaping with the only child and its native nurse. During their flight the nurse and child became separated from the mother, and the only evidence of the fate of the child was a statement afterwards made by the nurse that the child was taken from her arms and carried off by the Sepoys. Mrs. Greene was murdered at Lucknow on the 16th of November. On a petition for payment out of the fund presented by persons claiming as next of kin of Mrs. Greene on the assumption that she survived the child, — the respondents being



the next of kin of the child, assuming it to have survived its mother, — Wood, V. C., held, following the rule in *Underwood v. Wing* (the principal case affirmed in the House of Lords under the name of *Wing v. Angrave* as above) — that the burden of proof lay on the respondents. “Upon the death of Mrs. Greene the fund became distributable among her next of kin, in which capacity the petitioners present themselves. Who claims against them? The respondents in such a case must show the title, whether of the intestate or testator, through which they claim. Under the circumstances it certainly seems highly improbable that the child should have survived its mother; but I rest my decision in favour of the petitioners entirely upon the case of *Underwood v. Wing*.” The order was made for payment out accordingly.

*Reg. v. Lumley* (1869), L. R., 1 C. C. R. 196, 38 L. J. M. C. 86, was a criminal case depending on the proof of death before a particular epoch. The female prisoner, in the year 1869, was convicted of bigamy. She had been married in Jersey in 1836 to V., with whom she lived in England until the middle of the year 1843. At this time they separated, and the prisoner returned to live with her parents in Jersey, resuming her maiden name. On the 9th of July, 1847, the prisoner, describing herself as a spinster, married L. Nothing had been heard of V. from the time when she left him in 1843. There was no evidence of the age of V. The Judge at the trial directed the jury, as a presumption of law, that V. was alive at the date of the marriage in 1847. The Court for Crown Cases Reserved held that there was no presumption of law that V. was alive for 7 years or for any other period after the latest proof of his being alive, and that it was a question of fact for the jury, under the circumstances of each case, whether he were alive or dead at any particular period within the 7 years. “The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way.” *Reg. v. Lumley* (1869), L. R., 1 C. C. R. 196, 38 L. J. M. C. 86.

In the case of *In re Beasney's trusts* (1869), L. R., 7 Eq. 498, 38 L. J. Ch. 159, W. B., a man of dissolute habits, earning a precarious living as a tailor, but chiefly supported by relatives, and also being entitled to dividends on a sum of £1000 in Court for which he always punctually applied, was last seen by a relative in August, 1860, in an abject

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condition and suffering from pulmonary disease. He had received his dividends in the previous April; but no application was made for the October (1860) dividends, or for any subsequent dividends. In 1869 an application was made for payment out of the fund by the person who would be entitled to it on the assumption that W. B. died before the 14th November, 1860. MALINS, V. C., citing *Doe v. Nepean*, and referring to his own decision in *Re Benham's trust*, ordered payment out according to the petition. It seems that the VICE-CHANCELLOR's attention had not been directed to the reversal of his order in *Re Benham's trust* (on the 6th of Dec. previous). But the case probably furnishes an instance of facts from which the inference which he drew was justifiable. The decision is mentioned without disapproval in *Re Phené's trusts*, *infra*, and a similar decision on somewhat similar facts will be found in *Hickman v. Upsall* (1875). L. R., 20 Eq. 136.

In *Re Phené's trusts* (Ch. App. 1870), L. R., 5 Ch. 139, 39 L. J. Ch. 316, 22 L. T. 111, 18 W. R. 303, the authorities were elaborately reviewed and considered by Lord Justice GIFFARD. The case was as follows: —

A testator by his will gave the residue of his estate to his nephews and nieces equally, and died on the 5th of January, 1861; and subsequently the executors paid into the Chancery Court of the Duchy of Lancaster a sum representing the share which a nephew N. P. M. would have taken on the assumption that he survived the testator. In 1869, N. P. M. not having been heard of for 7 years, administration was taken out to him and a petition presented for payment out of the fund to the administrator.

The facts proved were the following: N. P. M. in 1853, being then about 24 years of age, went to the United States. He subsequently corresponded with his mother at short intervals. The last letter she received was dated 15th August, 1858, and was written on board the U. S. Frigate *Roanoke*. In this letter he informed his mother that he expected to be long absent, and would write immediately on his return from his voyage. The information furnished by the American Navy Department was that one N. M. (who was admitted to have been the N. P. M. in question) was a sergeant of marines on board the *Roanoke*; that he deserted on 16 June, 1860, on leave of absence from New York to join the Philadelphia station, and had not been heard of since. No further intelligence was ever gained of N. P. M.

The VICE-CHANCELLOR of the Duchy (afterwards Lord Justice JAMES) ordered the fund to be paid out to the petitioner, the administrator of N. P. M. But Lord Justice GIFFARD, after an exhaustive review of the cases, and citing at length from the judgment of the Exchequer Chamber in *Nepean v. Doe*, discharged the order of the VICE-CHANCELLOR. "The true proposition," he observed, "is, that those who found a right

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upon a person having survived a particular period must establish that fact affirmatively by evidence. . . . Survivorship of a testator is requisite to clothe a legatee with that character. . . . And it follows that the representatives of a person alleged to be a legatee must prove, as against the other members of the class who prove their survivorship, that he survived the testator, otherwise he was not a legatee at all. For these reasons, and upon a review of the authorities, and the judgments on which they rest, I am of opinion that there is no presumption of law as to the particular period at which Nicholas Phené Mill died; that it is a matter of fact to be proved by evidence, and that the *onus* of proof rests on his representative." Upon the evidence he could not draw the inference that N. P. M. was alive when the testator died in January, 1861. On the contrary, it might be inferred from the Navy report that his leave was up on or before the 16th June, 1860, and as he did not reappear, his name was set down as a deserter; and if a conclusion could be drawn from these facts, it would be that a person in the position of a sergeant, having nothing against his character, would not desert, and that he had died while on leave, and so was not heard of by the authorities. But it was enough to say that the burden of proof was on the representative of N. P. M., and that he had not discharged it.

Owing to the care with which this judgment of the late Lord Justice GIFFARD was prepared, as well as his very high authority as a sound judge, the rule as laid down by the Lord Justice in *Re Phené's trusts* has never since been questioned. The result is that even the authority of V. C. KINDERSLEY in *Dunn v. Snowden*, and two other decisions of his which involved the proposition that the *onus* of proving the particular time of death within the 7 years lay upon the person relying upon the particular epoch of death, stands overruled. And of course there is an end of V. C. MALIN's judgment in *Re Benham's trusts*. On the other hand, the LORD JUSTICE confirmed the authority of the two principal cases above given, and also of the decision of V. C. WOOD in *re Greene's Settlement* and the ruling of Lord Justice ROLT in *Re Benham's trusts, supra*. The cases of *Lakin v. Lakin* and *In re Beasney's trust, supra*, where the time of death is inferred from the particular facts, are left untouched.

*In re Phené's trusts, supra*, was followed by Lords Justices JAMES and MELLISH in *Re Leure's Trusts* (1871), L. R., 6 Ch. 356, 40 L. J. Ch. 602, 24 L. T. 533, 19 W. R. 617 (affirming L. R. 11 Eq. 236, 23 L. T. 692), and by NORTH, J. in *In re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586, 56 L. J. Ch. 825, 57 L. T. 652.

In *Re Corbishley's Trusts* (1880), 14 Ch. D. 846, 49 L. J. Ch. 266, 28 W. R. 536, a question arose in a somewhat different way. By a settlement dated in 1866, a trust was declared of a sum of money in

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favour of H. C. The sum had been paid into Court under the Trustee Relief Act, and a petition was presented by the representatives of the settlor claiming the sum under a resulting trust, on the ground that H. C. had disappeared about 5 years before the date of the settlement, and had not since been heard of. HALL, V. C., before whom the petition came, distinguished the case from that of a will where the persons claiming through the legatee must prove that he survived the testator, and considered the fact of H. C. being named in the settlement as *prima facie* evidence of his existence at that time, so as to throw the *onus* upon the petitioner claiming under a resulting trust. He made the order for payment of the fund to the legal personal representative of H. C. when constituted.

In an action on a policy of insurance, the question arose whether the insured was alive or dead. His sister and brother-in-law gave evidence showing that he had not been heard of for 7 years, but admitted that a niece of his had within that time seen a man whom she believed to be the insured, but that he disappeared in the passing crowd. The other relatives had believed the niece to be mistaken, and no effort had been made to find him in Melbourne. The jury also believed her to have been mistaken; but the Judge directed them that they could not on this evidence say that the man had not been heard of for the last seven years. The Court of Appeal ordered a *venire de novo*, and on the case coming to the House of Lords (opinions being equally divided), the decision of the Court of Appeal was affirmed. *The Prudential Assurance Company v. Edmunds* (1877), 2 App. Cas. 487.

In the practice of the Probate Court relating to the grant of administration or probate the presumption arising from the testator or intestate not having been heard of for 7 years is followed; but it is contrary to the practice of the Court to presume the death of a person other than the one whose estate is in question. *In the goods of Amelia Clark* (1889), 15 P. D. 10, 59 L. J. P. 6, 61 L. T. 653, 38 W. R. 448. If it is a question of the death of a husband or next of kin nearer than the applicant, the alternative seems to be that the applicant should take the responsibility of swearing to the death, or the usual advertisements must be issued.

A husband and wife executed mutual wills appointing each other executors and universal legatee. Both perished on a voyage in a ship which was lost with all hands. On an application for administration to both estates, BUTT, J., as the best way out of the difficulty, made several grants of administration to the next of kin of each with the will annexed, in each case, with leave to swear the death as having occurred on or after the date when the ship was last spoken. *In the goods of Alston* (1892), 1892, P. 142; 61 L. J. P. 92; 66 L. T. 591.



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Where the death of a (testator or) intestate has been presumed by the duly authorised tribunal of the country where he was domiciled at the time of his disappearance, the Court, being satisfied as to the *bona fides* of his alleged domicile, will follow the grant of the foreign Court, and order his death to be presumed without requiring further evidence. *In the goods of Spenceley* (1892), 1892, P. 255, 61 L. J. P. 133.

In Scotland, presumptions founded on the English law have been introduced by Statute, 54 & 55 Vict. (1891), c. 29, repealing, and re-enacting with variations, the Act made in 1881 with a similar object.

### AMERICAN NOTES.

This doctrine is well supported in this country by a great number of cases. The first branch of the Rule is declared in effect in *Dacie v. Briggs*, 7 Otto (U. S. Sup. Ct.), 628; *Stevens v. McNamara*, 36 Maine, 176; 58 Am. Dec. 740; *Forsaith v. Clark*, 21 New Hampshire, 424; *Flynn v. Coffee*, 12 Allen (Mass.), 133; *McDowell v. Simpson*, 1 Houston (Delaware), 467; *Johnson v. Johnson*, 114 Illinois, 611; 55 Am. Rep. 883; *Spurr v. Trimble*, 1 A. K. Marshall (Kentucky), 278; *Doe v. Flanagan*, 1 Georgia, 538; *Smith v. Smith*, 19 Alabama, 156; *Primm v. Stewart*, 7 Texas, 178; *Hancock v. Ins. Co.*, 62 Missouri, 26; *Ashbury v. Sanders*, 8 California, 62; 68 Am. Dec. 200; *Youngs v. Heffner*, 36 Ohio State, 232; *Gibbes v. Vincent*, 11 Richardson Law (So. Car.), 323; *King v. Paddock*, 18 Johnson (New York), 141; *Spencer v. Roper*, 13 Iredell Law (Nor. Car.), 333; *Waite v. Coaracy*, 45 Minnesota, 159; *Hershey v. Sherk*, 58 Pennsylvania State, 385; *Spears v. Burton*, 31 Mississippi, 554; *Tilly v. Tilly*, 2 Bland Chancery (Maryland), 444; *McCartee v. Camel*, 1 Barbour Chancery (New York), 455; *Sprigg v. Moale*, 28 Maryland, 497; 92 Am. Dec. 698.

Greenleaf says this is "the better rule" (1 Evidence, sect. 41, *n.*), but that a few cases hold that the presumption is that the person is alive at the end of the seven years. Citing *Montgomery v. Berans*, 1 Sawyer (U. S. Circ. Ct.), 653; *Puckett v. State*, 1 Sneed (Tennessee), 355; *Clarke's Ex'rs v. Canfield*, 15 New Jersey Equity, 119; *Eagle v. Emmet*, 4 Bradford (New York Surrogate), 117; *Smith v. Knowlton*, 11 New Hampshire, 191. In *Eagle v. Emmet*, *supra*, the Court cited *Nepean v. Knight*, and observed: "In *Newman v. Jenkins*, 10 Pickering R. 515, an agent whose principal had been absent seven years and was presumed to be dead, had received from him a note within the seven years, and in an action on the obligation it was decided that he was not bound to show in point of fact that his principal was living when the note was given, but he might rely upon the presumption of law in favour of life. In *McCartee v. Camel*, 1 Barbour's Ch. R. 456, the Chancellor of this State, referring to Lord DEXMAN's decision in *Nepean v. Knight*, 5 B. & Ad. 86, as to the presumption in case of absence, said, 'the only presumption arising from such absence is that the party is dead, if he has not been heard of within the seven years mentioned in the statute, not that he died at any particular time within the seven years, or even on the last day of that term.' And he held

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that a person who had been absent only two years, at the decease of an intestate in whose estate he was entitled to share, could not be presumed then dead, though more than seven years had subsequently lapsed without tidings. In *Burr v. Sim*, 4 Wharton's R. 150; 33 Am. Dec. 50, Justice GIBSON denied the authority of the doctrine laid down by Lord DENMAN, and thus stated the rule: "The presumption of death as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period, so that the person must be taken to have then been dead, *and not before*." The Court admitting, as Lord DENMAN admitted, that the presumption must be influenced by facts and circumstances, proceeded to inquire what was to be done when there were no accompanying circumstances or ground for inferring death at any particular time, and concluded that in such a case, "whenever the law is invoked as to rights depending upon the life or death of the absent party, he is to be deemed as living until the seven years have expired, and after that he is to be deemed as dead. Not that the law finds as a matter of fact that he died on the last day of the seven years, but that rights depending on his life or death are to be administered as if he had died on that day. It is impossible to say when he died, or even to assert as a matter of fact that he is dead; but in the absence of all evidence, the law will account him as dead at a certain time and not before." In *Shown v. McMackin*, 9 Lea (Tennessee), 601; 42 Am. Rep. 680, the Court held that it must be presumed that death occurred within the seven years, observing: "Some of the authorities hold that when the presumption attaches, it only implies that the party is dead, but not that he died at any particular time during the period. *Doe v. Nepean*, 5 B. & Ad. 86; 2 M. & W. 891. Other authorities seem to hold that the presumption, as well as the fact of death, attaches to the time, and fixes the date of the death at the end of the seventh year. *Hickman v. Upsall*, 13 Eng. Rep. 676; *Clarke v. Canfield*, 2 McCarter Eq. 119."

On the other hand, in *Davie v. Briggs*, *supra*, the Court refer to *Nepean v. Knight* as "the leading case," and approve it, observing: "To the same effect are Mr Greenleaf and the preponderance of authority in this country," citing particularly *Spencer v. Roper* (Nor. Car.), *supra*, which approved *Nepean v. Knight*. The prevailing rule is well expressed in *Johnson v. Johnson*, *supra*: "The general rule is that life continues for seven years after the party is last heard from, and after the lapse of that time death is presumed; but the presumption is not conclusive — is *presumptio juris* only — and may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. Under the rule seven years must elapse before the presumption of death arises. When the seven years have elapsed, the fact of death is presumed; but there is no presumption that the life continued through the entire period, or that it was or was not extinguished at any particular time within it, — that is, the law raises no presumption as to the time when, within the seven years, the death in fact occurred."

By the civil law, death is never presumed from absence, for an absentee is presumed to live till his death is proved, or until he attains the age of one hundred years. *Hayes v. Berwick*, 2 Martin (Louisiana), 138; 5 Am. Dec. 727.

The second branch (as to survivorship) is sustained by *Newell v. Nichols*, 75 New York, 78; *Russell v. Hallett*, 23 Kansas, 276; *Coye v. Leach*, 8 Metcalf (Mass.), 371, 41 Am. Dec. 518, *Smith v. Croom*, 7 Florida, 144; *Robinson v. Gallier*, 2 Wood (U.S. Circ. Ct.), 178; *Kansas P. R. Co. v. Miller*, 2 Colorado, 412; *Fuller v. Linzee*, 135 Massachusetts, 468; *Ehle's Will*, 73 Wisconsin, 445 (citing *Wing v. Angrave*); *Cook v. Caswell*, 81 Texas, 678.

Lawson on Presumptive Evidence (p. 242) cites *Wing v. Angrave*, and approves its doctrine, citing other English cases. *Wing v. Angrave* is cited at length in 1 Greenleaf on Evidence (15th ed.), p. 47.

The question of survivorship was extensively discussed by Chief Justice CHURCH, in *Newell v. Nichols*, 75 New York, 78, citing *Wing v. Angrave* (Angram), and other English cases. He says:—

“The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. In this respect the common law differs from the civil law. Under the latter, certain rules prevail in respect to age, sex, and physical condition, by which survivorship may be determined, but nothing can be more uncertain or unsatisfactory than this conjectural mode of arriving at a fact, which from its nature must remain uncertain, and often upon the existence of which the title to large amounts of property depend. In the language of the LORD CHANCELLOR, in *Wing v. Underwood* (1 De Gex, M. & G. 633), ‘We may guess, or imagine, or fancy, but the law of England requires evidence.’ There are cases where a strong probability, in theory, at least, would arise that one person survived another, and perhaps as strong that there was a survivor, and yet the common law wisely refrains from acting upon it in either case. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster is not deemed sufficient. If there are other circumstances shown, tending to prove survivorship, Courts will then look at the whole case, for the purpose of determining the question; but if only the fact of death by a common disaster appears, they will not undertake to solve it on account of the nature of the question, and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not, as a question of probability, very unlikely to happen. At most, the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. This is done, not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary. The authorities are uniform upon this doctrine, but the expressions of some of the judges in announcing it are liable to be misunderstood as indicating a presumption of simultaneous death which is not the rule.”

The same doctrine was adjudged in *Cowman v. Rogers*, 73 Maryland, 403;

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10 Lawyers' Rep. Annotated, 550, citing *Wing v. Angrave*, in respect to the death of father, mother, and children in a flood which destroyed their dwelling-house, the Court observing: "Whether Mr. and Mrs. Hooper were drowned or were killed by the falling of the house, and whether the children were also drowned or were crushed by the shattered timbers of the building, no human being can tell. Whether the wife survived the husband, or the husband the wife, or whether both expired simultaneously, may be subjects for speculation and conjecture, but can never be proven or known. Whether their children survived them, or died before their parents, is shrouded in equally impenetrable uncertainty. As observed by the Lord Chancellor in *Wing v. Underwood*, 4 DeG., M. & G. 633, 'we may guess, or imagine, or fancy, but the law of England requires evidence.'" "If we were to draw inferences of the duration of life after a person has been submerged, these inferences would be at best only speculative, and necessarily uncertain and unsatisfactory. And in regard to the husband and wife, who when last seen alive were both in the parlor of their home, there is not the faintest shadow of a fact upon which to base even a conjecture as to survivorship. The only thing which is certain is that all perished in a common catastrophe."

The same was adjudged in *Johnson v. Merithew*, 80 Maine, 111; 6 Am. St. Rep. 162, observing, "the fact of survivorship, like every other fact, must be proved by the party asserting it," and citing *Wing v. Angrave*. See also *Kansas P. Ry. Co. v. Miller*, 2 Colorado, 442, 464.

So in *Coye v. Leach*, 8 Metcalf (Mass.), 371; 41 Am. Dec. 518, the same was held, the Court refusing to entertain any presumption of survivorship as between a father of seventy and his daughter of thirty-three years, both perishing in the same shipwreck, but intimating (unnecessarily) that a presumption might be entertained that an adult of middle age and vigor survived an infant of very tender years or a man well stricken in years. The English cases down to 1844 were reviewed.

In *Moehring v. Mitchell*, 1 Barbour Chancery (New York), 264, the presumption was entertained that a husband survived his wife.

In *Smith v. Croom*, 7 Florida, 140 (citing *Underwood v. Wing*, 19 Beavan, 459), the one last seen alive was held to be the survivor; but in *Russell v. Halliott*, 23 Kansas, 276, where after the overturning of a boat from which a mother and her infant children were drowned, the mother was heard to cry for help, this was held not to support a presumption of her survivorship. To like effect, *In re Ridgway*, 4 Redfield (N. Y. Surrogate Ct.), 226.

In his notes on Best on Evidence, p. 305, Mr. Chamberlayne says the American cases conflict; "the prevailing and better opinion however is that there is no presumption whatever as to date of death within the seven years. The *onus* is on the one whose case demands proof of death at any particular period," and he supports the Rule as to survivorship, at p. 309.

See note, 41 Am. Dec. 522, citing *Wing v. Angrave* and other English cases.



DOE D. BANNING *v.* GRIFFIN.

K. B. 1812.

## RULE.

IN pedigree cases, in addition to a presumption of death, a presumption may be further made from repute in the family that a person died without issue.

**Doe d. Banning v. Griffin.**

15 East, 293-294 (s. c. 13 R. R. 474).

[293] Proof by one of a family, that, many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment.

Jekyll moved for a new trial in this ejectment, in which the plaintiff had recovered a verdict before GRAHAM, B. at Salisbury; and stated that the objection arose upon a question of pedigree, whether Thomas Griffin, a younger brother of the person last seised, through whom both the lessor of the plaintiff and the defendant were to make title, if at all, had died without issue; which it was incumbent upon the lessor of the plaintiff to show before [\* 294] he could entitle himself to recover \* upon the general merits of the case. For this purpose Mrs. Jeffries, an elderly lady, one of the family, had been called to prove, that Thomas had many years before, when a young man, gone abroad, and according to the repute of the family, had afterwards died in the West Indies, and that she had never heard in the family of his having been married. This he contended was not sufficient evidence for the lessor of the plaintiff, on whom the affirmative proof lay, that Thomas had in fact died unmarried, and without lawful issue, which was capable of being proved by persons still living, if the fact were so.<sup>1</sup>

<sup>1</sup> *Richards v. Richards*, B. R. E. 4 G. 2. Ford's MS. "In ejectment the lessor of the plaintiff claimed as heir by descent, and showed the death of his elder brother,

but not that they died without issue. *Curia*. This must likewise be proved. The plaintiff must remove every possibility of title in another person before he

No. 3. — Doe d. Banning v. Griffin, 15 East, 294. — Notes.

LORD ELLENBOROUGH, C. J. The evidence was sufficient to call upon the defendant to give *prima facie* evidence at least that Thomas was married; for what other evidence could the lessor be expected to produce that Thomas was not married, than that none of the family had ever heard that he was.

PER CURIAM,

*Rule refused.*<sup>2</sup>

#### ENGLISH NOTES.

In *Doe d. Oldham v. Wolley* (1828), 8 B. & C. 22, at the trial of an ejectment in 1828, in order to prove that F. W. was heir of A. a deed was produced being a settlement made in 1689 on the marriage of T. W., the grandfather of A., by which it appeared that T. W. (the grandfather) had several brothers, of whom E. W., the grandfather of F. W., was the youngest. No evidence was given to show what had become of the other brothers, or that they died without issue. But wills of some members of the family made after the date of the marriage settlement were produced, and they did not mention any brothers except T. W. (the grandfather of the testator) and E. W. (the grandfather of F. W.). VAUGHAN, B., who tried the case, said that, in the absence of any evidence to the contrary, the jury might presume that they died without issue, and the jury found a verdict for the plaintiff. Lord TENTERDEN, C. J., refused a rule for a new trial.

In *Greaves v. Greenwood* (C. A. 1877), 2 Ex. D. 289, 46 L. J. Ex. 252, 36 L. T. 1, 25 W. R. 639, at the trial in 1876 of an action for the recovery of land, it was proved, on the part of the defendant, that N. W., who was born in 1717, and whose issue, if he left any, would be nearer in the inheritable line of descent than the plaintiff, was alive in 1755. There was no direct evidence of his death. It was, however, proved that shortly after the death of J. F. W. (the intestate who was the last purchaser) his widow, in order to find out who was entitled to certain property in Yorkshire and elsewhere, advertised for the heir-at-law of J. F. W., describing his extraction; and that although several persons came to claim the property, no one was able to establish any relationship except the plaintiff, who took possession of the Yorkshire property accordingly. It was held by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that there was sufficient evidence

can recover: no presumption being to be admitted against the person in possession." In this case there was no negative evidence of the marriage of such brothers as in the principal case.

<sup>2</sup> See Bull. N. P. 294, citing *Grimwade v. Stevens*, Kent, 1697. "Hearsay is good evidence to prove who is my grandfather,

when he married, what children he had, &c.: of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin, or other relation beyond the sea dead: and the common reputation and belief of it in the family gives credit to such evidence."

## No. 3. — Doe d. Banning v. Griffin. — Notes.

from which a jury might infer the extinction of the line of descent through N. W. There were other lines of descent as to which there could be no positive proof relating to their continued existence without going back for 150 years. It was held that in the absence of evidence to show their continued existence, they might be presumed to be extinct. It was observed that, against any argument that the plaintiff should go back so far to prove a negative, it would be a solid objection, that according to that argument no person claiming through a maternal line could succeed unless he exhausted all the male paternal ancestors who ever existed.

In *Lyell v. Kennedy* (C. A. 1887), 18 Q. B. D. 796, 811 (1889), 14 App. Cas. 437, evidence similar to that in *Greaves v. Greenwood*, *supra*, was held by STEPHEN, J. — in a judgment affirmed on this point by the Court of Appeal and ultimately affirmed in the House of Lords — to be sufficient to show the extinction of certain lines.

## AMERICAN NOTES.

The principal case is cited by Greenleaf on Evidence, vol. 1, sect. 103.

In Lawson on Presumptive Evidence, p. 197, it is laid down: "One who is proved to have been unmarried when last known to be alive, will be presumed to have died childless; but it is otherwise when he or she was married when last known to be alive." Citing the principal case, and *McComb v. Wright*, 5 Johnson Chancery (New York), 263; *Hammond's Lessees v. Inloes*, 4 Maryland, 138; *Stinchfield v. Emerson*, 52 Maine, 465; *Emerson v. White*, 29 New Hampshire, 182; *Hays v. Tribble*, 3 B. Monroe (Kentucky), 106; *Campbell v. Reed*, 24 Pennsylvania State, 498.

In the last case it was said that if the person "had been a bachelor when last known or heard from, the presumption would be that he lived unmarried and without issue, but as he had a wife and child in full life when he left Adams county, the presumption of their death would not ignore their existence." In *Emerson v. White*, *supra*, the Court said: "We are not aware that there is any presumption of fact, from the mere absence of evidence, that a person did or did not die childless," but it was implied that it might be based on slight evidence, such as the statements of relatives.

In *Shawn v. McMackin*, 9 Lea (Tennessee), 601; 42 Am. Rep. 680, it was held that, "if the person was unmarried when he went abroad, and was last heard from, the presumption of his death carries with it the presumption that he died without issue. *Rowe v. Harland*, 1 W. Bl. 404; *Doe v. Griffin*, 15 East, 293."

In *McComb v. Wright*, *supra*, Chancellor KENT held that ignorance in the family of the existence of two children for more than forty years raised the presumption of death without issue.

In *Hammond's Lessees v. Inloes*, *supra*, the Court said: "Nor does the law presume that a person who is proved to be dead left no heirs. The death of a person may be presumed after a long lapse of time, as was done in *Doe* on

## No. 8. — Doe d. Banning v. Griffin. — Notes.

the demise of *Oldnall v. Deakin and Worley*, 3 Carr & Payne, 402, where the persons said to be dead would if alive have been one hundred and fifty years old. When persons are known to have survived ninety and one hundred years, we cannot say that others have died at an earlier age, without some evidence on the subject." The Court cite *Richards v. Richards*, 15 East, 293, note, to the point that in ejectment, where one "who many years before went abroad, and according to repute in the family had died abroad, and the witness never heard in the family that he was married, this was *prima facie* evidence that he died without issue; but where the death only is proved in such case, without some negative proof of the existence of issue, it is not sufficient, the plaintiff being bound to remove every possibility of title in another before he can recover against the person in possession."

Mr. Wharton (2 Evidence, sect. 1279), says: "When simply the fact is known of the death of a person capable of having had issue, death without issue cannot be presumed. But such presumption may be drawn from any circumstances indicating non-marriage or childlessness."

Presumption of death, without issue, will arise where inquiry concerning parties discloses that nothing has been heard of them in seventy years. *King v. Fowler*, 11 Pickering (Mass.), 302.

The doctrine of the Rule was directly sustained by the character of evidence admitted in *Pancoast's Lessee v. Addison*, 1 Harris & Johnson (Maryland), 350; 2 Am. Dec. 520, 526, although there was no discussion of the point in the opinion. So in *Sprigg v. Moale*, 28 Maryland, 497, the admissibility of repute was recognized, and its necessary character as to certainty was defined according to Lord LANGDALE'S rule in *Johnson v. Todd*, 5 Beavan, 599.

But the presumption is somewhat dependent on lapse of time. Thus in *Vought v. Williams*, 46 Hun (New York), 638; 120 New York, 453; it was not entertained (on a question of marketability of title) on a lapse of twenty-five years; distinguishing *McComb v. Wright*, *supra*, where the absence was upwards of forty years, and the party "had often threatened to commit suicide."



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No. 1. — **Mitchell v. Simpson**, 25 Q. B. D. 183. — Rule.

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## DEBTORS ACTS.

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No. 1. — **MITCHELL v. SIMPSON.**

(C. A. 1890.)

No. 2. — **IN RE SMITH, HANDS v. ANDREWS.**

(C. A. 1893.)

### RULE.

AN order for attachment or committal, made under the Debtors Acts 1869, and 1878 (32 & 33 Vict. c. 62 and 41 & 42 Vict. c. 54), is punitive.

### **Mitchell v. Simpson.**

25 Q. B. D. 183-192 (s. c. 59 L. J. Q. B. 355, 63 L. T. 405, 38 W. R. 565).

*Attachment for Debt — Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 4, 5.*

[183] A judgment debtor arrested by virtue of an order of commitment under s. 5 of the Debtors Act, 1869, is not a person arrested by virtue of an "attachment for debt within the meaning of s. 14 (1) of the Sheriffs Act, 1887. Such debtor may, therefore, notwithstanding that enactment, be taken to prison within twenty-four hours of his arrest.

Appeal from the judgment of the Queen's Bench Division, 23 Q. B. D. 373, 58 L. J. Q. B. 425.

The action was against the high bailiff of the Salford Hundred Court of Record for a breach of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 14, (1)<sup>1</sup> in taking the plaintiff to prison within twenty-four hours of his arrest.

The trial took place before MANISTY, J., and a jury, when evidence of the following facts was given on behalf of the plaintiff:—

<sup>1</sup> 50 & 51 Vict. c. 55, s. 14 (1): "Where an officer being a sheriff, undersheriff, bailiff, serjeant at mace, or other officer whatsoever, arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not

"(c) take such person to any prison within twenty-four hours of the time of

his arrest, unless such person refuses to be carried to some safe and convenient dwelling-house of his own nomination, not being the private dwelling-house of such person, and being within the borough or town where such person was arrested. . . ."

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No. 1. — *Mitchell v. Simpson*, 25 Q. B. D. 183, 184.

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A judgment was recovered in the Salford Hundred Court of Record against the plaintiff for a sum of £31 1s. 4d.; and, upon default by him in payment of the same, and proof of his having had sufficient means to pay, an order was made by the learned judge of that Court under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), that the plaintiff should be imprisoned for twenty-one days, or until he should pay the said sum. By virtue of that order the defendant caused the plaintiff to be arrested in London upon the evening of June 18, 1888, and taken to a police station. The plaintiff requested to be taken to an hotel for the night, but his request was refused, and he was kept for about \*four hours at the police station and then taken to St. [\*184] Pancras Railway Station, whence he was conveyed by train to Manchester and there lodged in gaol early the next morning. It was admitted for the defendant that, if s. 14 (1) of the Sheriffs Act, 1887, was applicable to the plaintiff's arrest, there had been an infringement of its provisions for which the defendant would be responsible; but it was contended that the section did not apply. The learned judge held that the order of commitment was not an attachment for debt within s. 14 (1), and he accordingly non-suited the plaintiff upon the ground that the section was inapplicable.

The plaintiff moved the Divisional Court to set aside the non-suit and for a new trial; but his application was refused.

April 29. CHANNELL, Q. C., and J. D. O'FLYNN, for the plaintiff. The terms of s. 14 (1) of the Sheriffs Act, 1887, *prima facie* include a commitment under s. 5 of the Debtors Act, 1869, for such a commitment is an attachment for debt. It is not a commitment for contempt, but process for compelling payment of the debt: *In re Ryley*, 15 Q. B. D. 329, 54 L. J. Q. B. 420. No doubt the Sheriffs Act is a consolidation Act, and the terms of the section are in the main similar to those of the 32 Geo. 2, c. 28, s. 1, which was held to apply only to arrest on mesne process. But there is a difference in the language of the two enactments, for the words "for debt" are inserted after the word "attachment" in the Act of 1887, which was not so in the earlier enactment, and, although it must be admitted that the attachment referred to in the Act of Geo. 2 was by necessary implication an attachment for debt, an inference arises from the mere fact of the alteration of the language that the legislature had some subject-matter in view when they so

No. 1. — *Mitchell v. Simpson*, 25 Q. B. D. 184, 185.

altered it. Mesne process was abolished by 1 & 2 Vict. c. 110, s. 1, which has since been repealed by 32 & 33 Vict. c. 83, but for which the similar provisions of s. 6 of the Debtors Act, 1869, are substituted. Therefore the words in the Sheriffs Act cannot have the same meaning as in 32 Geo. 2, c. 28. Imprisonment for debt by way of execution is abolished by the Debtors Act, 1869, except so far as it is retained by that Act. Therefore there [\*185] \*is no subject-matter to which the words "attachment for debt" can be applied, unless they apply to commitments under s. 5 of the Debtors Act, 1869. The words must, if possible, receive some meaning. The intention of the legislature appears to have been that a person, who might possibly, if he had an opportunity, be able to procure money to discharge the debt, should have an interval of twenty-four hours before being actually taken to prison within which to endeavour to procure the money.

[Lord ESHER, M. R. A debtor cannot be imprisoned under s. 5 of the Debtors Act, 1869, until he has been taken before the judge and ordered to pay the debt, and, such order having been disobeyed, there has been a subsequent order for commitment. Why should a further indulgence for twenty-four hours be necessary?]

[They also cited *Hume v. Drayff*, L. R. 8 Ex. 214, 42 L. J. Ex. 145.]

AMBROSE, Q. C., and A. J. DAVID, for the defendant. A commitment under s. 5 of the Debtors Act, 1869, is not an "attachment for debt." It has always been recognised as a thing *sui generis*, and altogether distinct from process by way of execution, with a name of its own. See Order XLII., rr. 3, 25; Order XLIV., r. 1, and the form of writ of attachment given in Appendix H. By rule 361, Bankruptcy Rules, 1886, the county court rules for the time being in force as to the committal of judgment debtors apply to all Courts. The form of committal order given by the County Court Rules, 1889 (Form 55), requires the bailiff to take the judgment debtor and deliver him to the governor of the prison, who is to keep him for so many days from the arrest. The order under the 5th section of the Debtors Act is in the nature of a committal for contempt in disobeying the order of the Court rather than of process for debt: *Morris v. Ingram*, 13 Ch. D. 338, 49 L. J. Ch. 123; *In re Gent*, 40 Ch. D. 190, 58 L. J. Ch. 162; *In re Freston*, 11 Q. B. D. 545, 52 L. J. Q. B. 545; *Holroyde v. Garnett*, 20 Ch. D. 532, 51 L. J. Ch. 664; *Middleton v. Chichester*, L. R. 6 Ch. 152; *Ex*

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*parte Dakins*, 16 C. B. 77, 24 L. J. C. P. 131. The Sheriffs Act, 1887, is merely a consolidation Act; and s. 14 (1) is substantially merely a reproduction of the provisions of 32 Geo. 2, c. 28, s. 1. It is well settled that \*the provisions of [\* 186] that Act only applied to arrest on mesne process: *Evans v. Atkins*, 4 T. R. 555. Sect. 14 (1) must receive a similar construction. It is the practice in a consolidation Act to re-enact every portion of the Acts consolidated which can have any possible force. Arrest on mesne process is not entirely abolished. It would still apply in the case of crown debts, for the crown is not named in the enactment of 1 & 2 Vict. c. 110, by which it is said mesne process was abolished, or in s. 6 of the Debtors Act, 1869. Moreover, arrest on mesne process was preserved under 1 & 2 Vict. c. 110, in cases under s. 3, where a debtor was believed to be about to leave the kingdom; and a similar power to arrest still exists under s. 6 of the Debtors Act, 1869. Sect. 29 of the Sheriffs Act, 1887, assumes that arrest on mesne process still exists in some cases. Imprisonment by way of final process still exists in the case of default in payment of a penalty mentioned in s. 4, clause 1, of the Debtors Act, 1869. Sect. 16 of the Sheriffs Act, 1887, shows that s. 14 (1) only applies to mesne process, for in that section, where the legislature are dealing with imprisonment by way of final process, they use quite different language from that used in s. 14 (1). The object of the provision of 32 Geo. 2, c. 28, s. 1, of which s. 14 (1) of the Sheriffs Act, 1887, is a reproduction, was to give the person arrested an opportunity of procuring bail. The machinery is altogether inappropriate to a commitment under the Debtors Act, 1869.

CHANNELL, Q. C., in reply. The Crown is mentioned in 1 & 2 Vict. c. 110, s. 103. The reservation of the rights of the Crown in that section by implication shows that the Act applies to the rights of the Crown, except so far as such reservation extends. Therefore arrest on mesne process cannot exist in the case of Crown debts. The cases in which s. 4 of the Debtors Act, 1869, preserves imprisonment for default in payment of sums of money, which are not debts, properly so called, cannot afford a subject-matter for the operation of s. 14 (1) of the Sheriffs Act, 1887, which speaks of attachment for debt. The case of a defendant about to abscond from England to avoid payment of his debts is one to which the provision of s. 14 (1) of the Sheriffs Act is still less appropriate



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[\*187] than it is to that of a person committed \* under the Debtors Act, 1869. The arrest in such a case under s. 6 of the Debtors Act is not arrest on mesne process. So far from its being the case that the commitment under s. 5 of the Debtors Act, 1869, has always been treated as generically different from imprisonment by way of execution, the 5th section of the Act itself provides that every order of committal under the section by any superior court shall be issued, obeyed, and executed in the like manner as a writ of ca. sa. *Cur. adv. vult.*

May 19. The following judgments were delivered:—

LORD ESHER, M. R. In this case the plaintiff sues the high bailiff of the Salford Hundred Court, because, when he was arrested under an order of commitment made by the judge of that Court under the Debtors Act, 1869, the defendant did not take him to some place—it was an hotel, I think, to which he requested to be taken—to be kept there for twenty-four hours, before being taken to prison under the commitment. The plaintiff was a person who had an order made against him under the 5th section of the Debtors Act, 1869—that is to say, he was a person who had been committed to prison on the ground that he had the means of paying a debt found to be due from him by the judgment of the Court, but wilfully refused and neglected to pay such debt. Being in that position, he brings this action against the bailiff for breach of the provisions of s. 14 (1) of the Sheriff's Act, 1887, because the defendant did not take him to an hotel as he requested, and keep him there for twenty-four hours. If the plaintiff had been taken to the hotel, he would have had to pay for his board and lodging himself. In other words, the suggestion is that a person who, having money to pay his debt, contumaciously refuses to do so, and is therefore committed, is to be taken to an hotel to enjoy himself, and spend his money there for twenty-four hours before being taken to jail under the commitment. A more unsubstantial cause of action could hardly be conceived; for I should think that no jury in such a case would give more than a farthing damages, even if the defendant were technically wrong. There is no suggestion that the defendant really did anything harsh in this case. If the contention for the plaintiff were well founded, [\*188] \*the result would be somewhat formidable. There are numbers of these orders of commitment made, especially

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in the county courts, against people who have the means to pay their debts, but are unwilling to do so. If in such cases the sheriff or other officer is bound to comply with s. 14 (1) (c) of the Sheriffs Act, 1887, as he is bound not to lose sight of the prisoner and to keep him in custody, there must be an officer in attendance on each of these persons during the twenty-four hours after the arrest. The inconvenience resulting would be enormous; and if our decision were in the plaintiff's favour, it is obvious that the intervention of the legislature would be immediately necessary. Nevertheless, if the plaintiff's contention is right, we must give effect to it.

The question is, whether an arrest upon a commitment order under the 5th section of the Debtors Act, 1869, is within s. 14 (1) of the Sheriffs Act, 1887. Such an order is an order that the person against whom it is made shall be imprisoned, not merely because he has not paid or cannot pay a debt, but for an offence; for non-payment of a judgment debt which he had the means of paying; for a contumacious refusal to obey the order of the Court after ample warning and opportunity. The Sheriffs Act, 1887, is a consolidation Act, and the provision in question follows very nearly in its terms those of 32 Geo. 2, c. 28, s. 1. What were the cases in contemplation of which that enactment was passed? They were cases, not where a judgment debtor had been committed by the order of a judge for contumaciously refusing to pay the judgment debt, though he had the means of payment, but where a person was arrested at the commencement of the action, and really at the mere will of the person suing him. The extortion by bailiffs and other abuses which existed under the system of arrest on mesne process then prevailing are matters of common knowledge. It was to prevent such abuses that the Act of 32 Geo. 2, c. 28, was passed. The preamble stated that "many persons suffer by the oppression of inferior officers in the execution of process for debt" — that is, process issued at the mere will of the person alleging that a debt was due to him — "and the exaction of jailers to whom such debtors are committed"; and it was provided by the 1st section, among other \*things, that the [\*189] sheriff should not carry any person by him arrested, or being in his custody by virtue or colour of any action, writ, process, or attachment, to any jail or prison within four and twenty hours from the time of such arrest, unless such person should re-

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fuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment, &c. It is said that, because in the 14th section of the Act of 1887 the words "for debt" are inserted after the word "attachment," it is not merely a repetition of the provision of the 32 Geo. 2, c. 28; but when we look at the preamble to that Act, which speaks of the execution of process for debt, it is obvious that the attachment mentioned in the 1st section must by necessary implication mean attachment for debt. So that the provisions of the two statutes are really exactly the same. Then is the commitment to prison by a judge under the 5th section of the Debtors Act, 1869, the same sort of thing as the attachment for debt with reference to which the Act of Geo. 2 was passed? In the one case the arrest is by order of a judge, made not merely because a debt is due, but because of a contumacious refusal to pay a judgment debt; in the other it was before judgment, and really at the will of the person suing out process. In the one case the imprisonment is for a period specified by the order of the judge; in the other it was for an indefinite time. In the one case there is what amounts, in my opinion, to an offence against the Court; in the other there was nothing in the nature of an offence. An order for commitment under the Debtors Act, 1869, appears to me to be entirely different in its nature and effect from the sort of process which was within the purview of the Act of Geo. 2; and therefore, apart from a further consideration which makes the case stronger, I should say that it cannot be within the terms either of that Act or of the Sheriffs Act, 1887. But there is this further consideration. As I have said, the Act of 1887 is a consolidation Act, and the provision in question is in substantially the same terms as that of the Act of Geo. 2, and therefore, in order to determine the meaning of the provision, we must consider to what the Act of Geo. 2 was applicable. It has been determined that the Act of Geo. 2 applied only to arrest on mesne process.

It was argued that there was no arrest on mesne process [\*190] \* in 1887 to which the provision of the Sheriffs Act, 1887, could be applied, and therefore that it must be applied to something else. It appeared to me, after the long discussion which took place on the subject, that there were still some cases in which arrest on mesne process, or something of the same nature, would be applicable. If there is anything else to which the words "attachment for debt" in the section can be applied, there is no

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reason for extending the indulgence given by the provision to cases where it would be highly inconvenient, and where there would be no justification for it, viz., to cases where a man who has been ordered to pay a debt and has means to pay it, after ample opportunity given him, contumaciously refuses to do so. For these reasons I think that the provision of the 14th section of the Sheriffs Act, 1887, did not apply to this case, and therefore this appeal should be dismissed.

Fry, L. J. The question which we have to determine is as to the true construction of the 14th section of the Sheriffs Act, 1887. That question may be stated to be whether an order of commitment under the Debtors Act, 1869, is an attachment for debt within the section. The Sheriffs Act, 1887, is a consolidating Act, and does not profess to amend or alter the provisions of the Acts consolidated. *Primâ facie*, therefore, the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted. The argument was put forward that, whereas in 1759, when the Act of Geo. 2 was passed, arrest on mesne process existed, to which that Act might be applied, — at the time when the Act of 1887 was passed arrest on mesne process had been abolished, and attachment for debt could not then have the signification which was given to it under the older Act; that some signification must be given to it; and that the only possible signification was that it applied to orders of commitment under the 5th section of the Debtors Act, 1869. That argument seems deserving of serious attention. It is plain, according to the decision in *Evans v. Atkins*, 4 T. R. 555, that the Act of Geo. 2 only applied to mesne process. Lord Kenyon, who presided over the Court which decided that \*case, stated that such had [\*191] always been the opinion in Westminster Hall ever since the Act was passed in 1759. From the statement so made, no doubt correctly, it would appear that that construction had been uniformly given to the Act previously to the time of that judgment; and, so far as appears, the same construction has been uniformly accepted since that judgment; for the learning and industry of counsel could not produce a single authority to the contrary. In the year 1838, the statute 1 & 2 Vict. c. 110, was passed, which was said to have abolished arrest on mesne process altogether, and so to have put an end to the subject-matter upon which the provisions of the Act of Geo. 2 operated. That statement seems to



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me to be erroneous. The 1st section of the statute enacts that no person shall be arrested upon mesne process in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner thereafter provided for) in any superior Court. The 3rd section gives power to a judge of a superior Court to order a defendant to be arrested where there is probable cause for believing that he is about to quit England. Therefore, the effect of the statute was not to abolish arrest on mesne process, but to confine it to certain cases and modify its operation. A further question of some nicety upon the language of the Act is, whether there might not still be arrest on mesne process at the suit of the Crown notwithstanding the Act. It is part of the prerogative of the Crown to avail itself of any process of which a subject might avail himself in an action; and consequently the Crown would have a right to avail itself of arrest on mesne process, though it might not have been in the habit of resorting to such process. I will not embark on the question whether the right of the Crown in this respect has or has not been taken away by the Act; it is not clear that it has been taken away; but, if it has not, then, at any rate in theory, there is another case in which arrest on mesne process still exists. But it is enough if it still exists in one case. That being so, when the Act of 1887, which as I have said was merely a consolidation Act, was passed, arrest on mesne process still subsisted, though in a restricted and modified form, and s. 14 (1) of the Act has therefore a subject-matter on which it can operate as the 1st section of the Act of Geo. 2 operated. There-  
[\*192] fore, \*the argument put forward appears to me to fail.

Under these circumstances, I think we ought to put upon the Act of 1887 the same construction as was put upon the Act of Geo. 2 by uniform practice and by the decision of the Queen's Bench rather than give a wholly new effect to a mere consolidation Act. For these reasons I think the appeal should be dismissed.<sup>1</sup>

<sup>1</sup> The reporter has kindly called my attention to an error in this judgment. It proceeds on the footing that mesne process under 1 & 2 Vict. c. 110, was in force when the Act of 1887 was passed, whereas in fact it had been abolished by the 6th section of the statute 1869, 32 & 33 Vict. c. 62. But although mesne process was in terms abolished, yet a new form of arrest was by the same section

of the Act of 1869 created, under which in certain cases arrest can take place before judgment and until security has been given. This appears to me to be in substance a new form of mesne process, and to this the statute of 1887, must, I think, be taken to refer. In spite, therefore, of my error, I think my judgment right —

EDWARD FRY.

No. 2. — *In re Smith, Hands v. Andrews*, 1893, 2 Ch. 1.

LOPES, L. J. I agree. The Act of 1887 is, as has been observed, a consolidation Act, and does not purport to amend or alter the law. Sect. 14, sub-s. (1) of that Act is substantially a re-enactment of s. 1 of 32 Geo. 2, c. 28. That section only applied to arrest on mesne process. In my opinion the provision of s. 14 (1) of the Act of 1887 has no further operation, and does not apply to commitments under the 5th section of the Debtors Act, 1869. It was said that this construction would give the provision nothing on which to operate. Even if that were so, I am not prepared to say that the section ought to have the operation contended for; but there are cases in which arrest in the nature of arrest on mesne process is still applicable, and therefore to which the section may apply. I should be inclined to think that arrest on mesne process still exists in the case of Crown debts; but there is no doubt that by leave of a Judge such an arrest can still be made in cases where there is ground for believing that the defendant is about to leave England. Therefore I think that the conclusion arrived at by the Divisional Court was correct, and their judgment should be affirmed.

*Appeal dismissed.*

**In re Smith, Hands v. Andrews.**

1893, 2 Ch. 1-19 (s. c. 62 L. J. Ch. 336; 68 L. T. 337; 41 W. R. 289).

*Attachment* — *Debtors Act*, 1869 (32 & 33 Vict. c. 62), s. 4 — *Debtors Act*, 1878 (41 & 42 Vict. c. 54) — *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), s. 9.

The remedy against the property or person of a debtor prohibited by [1] sect. 9 of the Bankruptcy Act, 1883, is in respect of a debt, and intended to enforce payment of that debt, but the remedy by committal or attachment under the Debtors Act, 1869, is punishment for an offence. Therefore the prohibition contained in the Act of 1883 does not take away the jurisdiction of the Court to order, under sect. 4, sub-sect. 3, of the Act of 1869, the committal or attachment of a defaulting trustee against whom a receiving order in bankruptcy has been made.

The discretion vested in the Court under the Debtors Act, 1878, ought to be exercised by refusing an attachment in the case of a trustee who has honestly remitted trust money to a co-trustee without seeing to its due application, and the latter has misapplied the money.

**Motion.**

Albert Smith, who died on the 19th of September, 1891, by his will, dated the 16th of September, 1891, appointed the defendants, Thomas Andrews and Peter S. Hooton, his trustees and executors, and devised and bequeathed all his real and personal estate to them upon trust for conversion and investment, and to pay the

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**Nc. 2. — In re Smith, Hands v. Andrews, 1893, 2 Ch. 1-3.**

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income to his mother during her life, and after her decease [\* 2] in trust for his children. The will contained a clause \* empowering the trustees to continue the business of a turf commission agent then carried on by the testator at Liverpool, or any other business which he might be engaged in at the time of his death, for so long as they should think fit, on the terms that his then present manager, R. Welch, should have the management thereof, and empowering Welch, during such times as the trustees continued the business, to employ agents and clerks, and generally to act in the conduct of the business as he in his discretion should think fit.

The testator at the time of his death was carrying on the business of a bookmaker and turf commission agent at a club in Liverpool, of which he was the principal or sole proprietor, Welch being manager of the bookmaking business, and Hooton general manager and secretary of the club.

The defendants, Andrews and Hooton, duly proved the will, and continued to carry on the business of the testator after his death.

The estate of the testator was insufficient for the payment of his debts, and the plaintiff, who was a creditor of the testator, on the 11th of February, 1892, commenced this action by originating summons in the Liverpool District Registry, for the administration of the testator's real and personal estate, and on the 26th of February, 1892, judgment was given directing usual administration accounts and inquiries.

On the taking of the accounts under the judgment it was found that a balance of £426 17s. 2d. was due from Andrews and Hooton to the estate, and on the 6th of August, 1892, an order was made, on further consideration of the action, directing them to pay that amount into Court. The £426 17s. 2d. comprised a sum of £75 which had been paid by Andrews and Hooton to their solicitor for costs, but which had been disallowed to them; a sum of £70, which appeared to have been paid to the testator's mother for the support and maintenance of his children; and a sum of £100, which had been paid into the testator's bank, and was not accounted for.

Andrews and Hooton did not obey the order of the 6th of August, 1892, and on the 19th of October, 1892, D. Somers, a creditor, who had obtained leave to attend the proceedings, [\* 3] and \* to whom the carriage of the judgment had been committed by order of the Court, moved for leave to issue a writ or writs of attachment against Andrews and Hooton for their

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No. 2. — *In re Smith, Hands v. Andrews, 1893, 2 Ch. 3, 4.*

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contempt in not having complied with the order of the 6th of August, 1892.

In opposition to this motion, Andrews made an affidavit (on which he was subsequently cross-examined) stating that he was unable to pay any part of the £426 17s. 2d., and that on the 8th of September, 1892, a receiving order in bankruptcy was made against him, and the adjourned general meeting of his creditors was to take place on the 31st of October, 1892. He further stated that the sum of £100 above-mentioned was, as he understood, money received from the testator's business, which was received out of the bank by Hooton, and by him applied in payment of losses and disbursements in the testator's business; he accounted in a similar way for other sums, and stated that the business was conducted by Hooton, and that he (Andrews) personally took no part in it; that it was not usual to keep any books in connection with the business, except betting books, and it was customary to destroy all the betting books every week, as soon as the race meetings referred to in such books were over; that the solicitor to the trustees advised that all books and records should be destroyed every week so far as possible, the object being to destroy all evidence in the event of police raids on the club; that the Registrar surcharged the £100 and certain other sums because it was not shown by documentary evidence how they had been applied; but that as the money was used in carrying on the business, and all books and papers were destroyed as soon as possible, no records were in existence by which the moneys could be traced or the amounts paid away satisfactorily accounted for. In cross-examination, he stated in effect that he left everything to Hooton, and that he believed the money received by Hooton was duly applied for the purposes of the business. It was admitted that the money received was paid into the bank in the joint names of Andrews and Hooton, but it did not appear whether the cheques drawn on the account were signed by both or by one of them.

Hooton also made an affidavit in opposition to the motion, and \* was cross-examined; but no satisfactory explanation of [\*4] the facts was elicited from him.

Previously to the hearing of the motion the solicitor to the trustees paid into Court the £75 which had been disallowed to Andrews and Hooton.



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No. 2. — *In re Smith, Hands v. Andrews*, 1893, 2 Ch. 4-14.

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The motion was heard before Mr. Justice KEKEWICH on the 5th of November, 1892.

After argument Mr. Justice KEKEWICH, on a review of the statutes and cases, held that he had jurisdiction, notwithstanding the bankruptcy in Andrews's case, to order an attachment. Further, that Hooton, having given no satisfactory explanation of the facts, must be treated as a dishonest trustee. As to Andrews, he stated the principle on which he exercised his discretion under the Act of 1878, as follows : —

"I am bound to say that, in my opinion, a trustee, whoever [11] he is, whether of a deed or will, who, having accepted the trusts, and knowing that he has to provide, it may be, for children or for a wife entitled for her separate use at the present time, or for legatees or creditors, simply does nothing at all, but walks away and leaves others to see to his duty, is dishonest. He is a man of no moral character, or not showing any morality in the performance of his duty."

He concluded : —

[13] "I think I should be wanting in my duty, painful as it is, if I hesitated to say that a writ of attachment must issue. That must be done ; and, of course, Andrews and Hooton must be ordered to pay the costs."

The defendants appealed. The appeal was heard on the 18th of January, 1893.

Renshaw, Q. C., and Durandu, for the defendants.

S. Hall, Q. C., and Rowden, for the applicant.

1893. Feb. 13. The judgment of the Court (Lord ESHER, M. R. LINDLEY and LOPES, L. JJ.) was read by

LINDLEY, L. J. : —

This is an appeal by two executors and trustees against an order directing a writ of attachment to issue against them under the authority conferred by the Debtors Act, 1869, s. 4, sub-s. 3, and amended by the Debtors Act, 1878 (41 & 42 Vict. c. 54).

On the 6th of August, 1892, an order was made in an [\* 14] action \* for the administration of their testator's estate on both the appellants to pay into Court £426 found due from them jointly ; and an order was also made on the appellant Hooton to pay into Court £90 found due from him separately. There was no summons to vary the chief clerk's certificate, and the liability of the defendants to pay these sums into Court as ordered must be

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No. 2. — In re Smith, Hands v. Andrews, 1893, 2 Ch. 14, 15.

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treated as indisputable. On the 8th of September a receiving order in bankruptcy was made against Andrews. The moneys not being paid, notice of motion for an attachment against both appellants was served on the 19th of October, 1892. Before this motion came on to be heard, viz., on the 1st of November, 1892, Andrews was adjudicated bankrupt. On the 19th of November the order appealed from for the issue of an attachment against both defendants was made. No proceedings in bankruptcy have been taken against Hooton. It becomes necessary, therefore, to consider their cases separately.

It will be convenient to take Hooton's case first, as it is the simpler of the two. He was an executor and trustee; he was ordered to pay money by a Judge of the High Court exercising the jurisdiction formerly exercised by Courts of Equity. The money which he was ordered to pay was the balance of moneys come to his hands and not accounted for by him. He had not got the money in his possession nor under his control when the order for the payment of it into Court was made; for he had misapplied the money which had come into his hands. But this circumstance did not excuse him from his liability to pay, nor prevent an order for attachment from being made under the Debtors Act, 1869. Courts of Equity refuse to allow a man to derive any benefit from his own wrongful conduct, and treat a trustee as still having that which he once had and ought still to have, although he may in fact have wrongfully parted with it. Acting on this principle, it was decided by the Court of Appeal in Chancery, as early as 1871, that an attachment might issue under sect. 4, sub-sect. 3, of the Debtors Act, 1869, against a trustee who made default in obeying an order to pay into Court money which he had received as trustee, but had misapplied before the order for payment was made, *Middleton v. Chichester*, L. R., 6 Ch. 152, 40 L. J. Ch. 237; \* and [\* 15] the construction then put upon the Act has been followed ever since: see *Crowther v. Elgood*, 34 Ch. D. 691, 56 L. J. Ch. 416; *Preston v. Etherington*, 37 Ch. D. 104, 57 L. J. Ch. 176. It was pointed out in *Middleton v. Chichester*, L. R., 6 Ch. 152, 40 L. J. Ch. 237, by Lord HATHERLEY (L. R., 6 Ch. 156, 40 L. J. Ch. 238), that all the debts specified in sect. 4 of the Debtors Act, 1869, in respect of which imprisonment was not abolished, were different from ordinary debts and were "debts the incurring of which was in some degree worthy of being visited with punishment," and

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 No. 2. — In re Smith, Hands v. Andrews, 1893, 2 Ch. 15, 16.
 

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he says, L. R., 6 Ch. 157, 40 L. J. Ch. 239: "In every case there is something of the character of delinquency pointed out."

In 1869, if an order for payment was made under sect. 4 and was disobeyed, an attachment was issued as a matter of course. But this was altered by the Debtors Act, 1878, under which a Judge applied to for an order for an attachment is intrusted with a discretion to grant or refuse the order. If, therefore, an order for attachment is made in a case falling within sect. 4 of the Debtors Act, 1869, this Court will not interfere with the exercise of the discretion of the Judge making the order, unless it can be shown that he has not exercised his discretion in the particular case, or that he has manifestly proceeded on a wrong ground: see *Crowther v. Elgood*. Nothing of the kind is shown in Hooton's case, and his appeal, therefore, ought to be dismissed.

The same principles are applicable to Andrews's case, save so far as they are affected by his bankruptcy. But the Bankruptcy Act, 1883, contains a section, viz., sect. 9, sub-sect. 1, which is as follows: "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose." This section is in substance the same

as the corresponding section in the earlier Bankruptcy Act [\*16] of 1869 (sect. 12). This last section was held by \*the Court of Appeal, in *Cobham v. Dalton*, L. R., 10 Ch. 655, 44 L. J. Ch. 702, to prevent an arrest without the leave of the Court of Bankruptcy, even in cases falling within sect. 4, sub-sect. 3, of the Debtors Act, 1869. It becomes necessary, therefore, to examine this case, and to determine whether it can be regarded as an authority which ought still to be followed, regard being had to subsequent legislation and to more recent decisions.

The subsequent legislation which is important consists, first, of the Debtors Act, 1878, which has been already noticed, and, secondly, of the Bankruptcy Act, 1883, which has replaced the Bankruptcy Act, 1869. The operative words in sect. 9, sub-sect. 1, of the Bankruptcy Act, 1883, are the same as those in sect. 12 of the previous Act of 1869; and, although the two sections are not

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No. 2. — *In re Smith, Hands v. Andrews*, 1893, 2 Ch. 16, 17.

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exactly the same, there is no difference between them material for the present purpose. Under both Acts, money due from a trustee in respect of a breach of trust, whether fraudulent or not, is a debt provable against his estate in the event of his bankruptcy. But there is a very remarkable difference between the two Acts as regards the effect of an order of discharge; for whilst under sect. 49 of the Bankruptcy Act, 1869, an order of discharge did not release a bankrupt from any breach of trust, under sect. 30 of the Bankruptcy Act, 1883, an order of discharge does release a bankrupt from all breaches of trust except fraudulent breaches of trust to which he was a party. Now, in *Cobham v. Dalton*, a defaulting trustee had been ordered to pay money into Court; and, on the same day that the order was made, he was adjudicated bankrupt. An order for his attachment was afterwards made *ex parte*, and he was arrested. He then applied in Chancery to be discharged. His application was refused. He appealed, and his appeal was allowed. The Court of Appeal treated sect. 12 of the Bankruptcy Act, 1869, as applicable to the case, and treated the money ordered to be paid into Court as a provable debt, although it was not a debt due to the person who obtained the order to pay and the order for the attachment. The Court further held that the debt, being a provable debt, the bankrupt was protected until discharged from arrest in respect of it; but that, as the Act then in force did not discharge him \*from the debt, he could be attached for it [\* 17] after his discharge. If the principle of this case is to be applied to the present case, it will follow that Andrews ought not to be arrested pending his bankruptcy, nor after his discharge, unless his liability to pay the £426 arose from some fraudulent breach of trust to which he was a party, which is not the case.

Although *Cobham v. Dalton* was decided in 1875, and *Middleton v. Chichester* was decided in 1871, and the Lords Justices who decided *Cobham v. Dalton* were members of the Court which decided *Middleton v. Chichester*, the view there taken and expressed with reference to the punitive character of sect. 4 of the Debtors Act, 1869, seems to have been overlooked by them. Lord Justice JAMES does not allude to it; Lord Justice MELLISH (L. R., 10 Ch. 657), said: "Now arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged." This observation was true of ordinary debts: *In re M'Williams*, 1 Sch. & Lef. 169; *Lees v. Newton*,



No. 2. — *In re Smith, Hand v. Andrews*, 1893, 5 Ch. 17, 18.

L. R., 1 C. P. 658, 35 L. J. C. P. 285; but not of obligations to pay under orders made under sect. 4, sub-sect. 3, of the Debtors Act, 1869. The punitive character of sect. 4 of the Debtors Act, 1869, which was pointed out in *Middleton v. Chichester*, has been since so often recognised that it cannot now be questioned: see *Morris v. Ingram*, 13 Ch. D. 338, 49 L. J. Ch. 123; *In re Gent*, 40 Ch. D. 190, 58 L. J. Ch. 162; although the Court has, under the Act of 1878, a discretion to grant or refuse an attachment in cases falling within it; and in one of the latest cases, viz., *Earl of Aylesford v. Earl Poulett*, [1892] 2 Ch. 60, 61 L. J. Ch. 406, an attachment against a defaulting trustee was refused. *In re Ryley*, 15 Q. B. D. 329, 54 L. J. Q. B. 420; *In re Manning*, 30 Ch. D. 480, 55 L. J. Ch. 613; *Preston v. Etherington*, 37 Ch. D. 104, 57 L. J. Ch. 176; and *Mitchell v. Simpson*, 25 Q. B. D. 183, 59 L. J. Q. B. 355 p. 558, *ante*, were referred to in the course of the argument; but they are not decisions upon the effect of sect. 9 of the Bankruptcy Act, 1883, upon commitments under sect. 4 of the Debtors Act, 1869. In these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil [\*18] process, \* but as punitive, is distinctly recognised. Having regard to the Debtors Act, 1878, and to the decisions to which we have referred, it would be clearly wrong now to apply Lord Justice MELLISH's observation in *Cobham v. Dalton*, above quoted, to obligations to pay money in obedience to orders made under the Debtors Act, 1869, s. 4, sub-s. 3.

Mr. Justice KEKEWICH therefore had, in our opinion, jurisdiction under the Debtors Act, 1869, to order an attachment against Andrews, notwithstanding his bankruptcy. But in this case the learned Judge exercised the discretion reposed in him by the Debtors Act, 1878, upon a ground which, in our opinion, was erroneous. Andrews trusted his co-trustee Hooton, and handed money to him, and this money was misapplied. Andrews is liable for it; but he was not himself guilty of any dishonesty or fraudulent breach of trust. Mr. Justice KEKEWICH ordered an attachment to issue against him on the broad ground that every trustee who trusts his co-trustee, and remits trust money to him, and does not look sharply after him, is dishonest and fraudulent. We cannot agree in this view, and, consistently with the principles upon which this Court acts in reviewing discretionary orders, we have come to the conclusion that Andrews's appeal ought to be allowed.

## Nos. 1, 2. — Mitchell v. Simpson : In re Smith, Hands v. Andrews. — Notes.

In doing so, we are not acting contrary to *In re Deere*, L. R., 10 Ch. 658, 660, 44 L. J. Bankr. 120. In that case, a solicitor who had become bankrupt was attached by a Baron of the Court of Exchequer, under the 4th section of the Debtors Act, 1869, and he applied to the Court of Bankruptcy to release him, but the Court refused. The Court of Bankruptcy had, under the Bankruptcy Act, 1869, which was then in force, a discretion in the matter; but it declined to interfere, and Lord Justice MELLISH said: "I think it is not right that this Court should decide the question whether the attachment was issued for punishment or merely to enforce compliance with the order for payment of money. That question ought to be decided by the Court which made the order." This decision and passage is not in point in the present case, for by "this Court" was meant, in *In re Deere*, the Court of Appeal sitting in bankruptcy. That Court was not entertaining, and had no jurisdiction to entertain, an appeal from the order for \*arrest. The present appeal is an appeal from [\* 19] the order for the attachment, and we have to rehear that order; and *In re Deere*, therefore, is not really in point.

The result, therefore, of the appeal is, that it succeeds in Andrews's case, but not in Hooton's. The order appealed from must therefore be discharged so far as it affects Andrews; but this is not a case for giving him any costs. As regards Hooton, the order will stand; but nothing will be gained by making him pay the costs of the appeal, nor has he materially put his opponents to expense by joining Andrews in his appeal.

## ENGLISH NOTES.

The Debtors Act, 1869, — of which the full title is "An Act for the abolition of imprisonment for debt, for the punishment of fraudulent debtors, and for other purposes," — by s. 4, abolishes imprisonment for making default in payment of a sum of money, excepting (*inter alia* and 3dly), "Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control."

Lord HATHERLEY, L. C., in *Middleton v. Chichester* (1871), L. R., 6 Ch. 152, 157, 40 L. J. Ch. 238, put the following construction upon the words of the section "in his possession or under his control." He says: "There is a sensible and intelligible construction to be put upon the clause, if you read it as pointing to a person who, in respect of his having held trust funds for which he is accountable, is treated by a

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**No. 1. — Clavering v. Clavering. — Rule.**


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Court of Equity as having them in his possession until he has properly discharged himself." Following this construction, Judges of the Chancery Division felt themselves obliged to order attachments in all cases where a trustee had, either alone or jointly with a co-trustee, acknowledged the receipt of trust money which the co-trustee made away with. It appears to have been in consequence of some hard cases of this sort that the Act of 1878 was passed. That Act, 41 & 42 Vict. c. 54, enacts that in cases coming within the exception or within the exception 4 which relates to certain kinds of default by a solicitor, the judge may inquire into the case and may grant or refuse, either absolutely or upon terms, any application for a writ of attachment.

The two cases above set forth at length sufficiently illustrate the principles on which the Court gives effect to these enactments.

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## DEED.

**SECTION I.** Execution and Effect.

**SECTION II.** Statutory Requirement that an Instrument should be by Deed.

**SECTION III.** Registration.

**SECTION IV.** Title Deeds.

**SECTION V.** Production of Deeds.

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### SECTION I. — *Execution and Effect.*

#### No. 1. — CLAVERING v. CLAVERING.

(CH. 1704. H. L. 1705.)

#### No. 2. — DOE D. GARNONS v. KNIGHT.

(K. B. 1826.)

#### RULE.

WHERE a deed has been formally sealed and delivered without anything to show an intention to suspend its operation, it takes effect from the date of its execution; and it is immaterial that the deed remained in the possession of the party executing it, or of some other person who was not the agent of the person in whose favour it was executed.

No. 1. — *Clavering v. Clavering*, 2 Vern. 473, 474.

**Clavering v. Clavering.**

Vern. 473-476 (s. c. Prec. Ch. 235; Eq. Cas. Abr. 24 pl. 6; 1 Brown's P. C. 122)

*Deed. — Execution. — Custody.*

A. in 1684, makes a voluntary settlement of an estate, subject to some [473] annuities, in trust for his grandson and his heirs, and afterwards, in 1690, he makes another voluntary settlement of the same estate, to the use of his eldest son for life, and to his first, &c., sons in tail, with remainders over; and by will gives a considerable estate to his grandson. Although it was proved that A. always kept the settlement of 1684 in his custody, and never published it; and it was after his death found amongst waste papers; and the deed of 1690 was often mentioned by him; and he told the tenants the plaintiff was to be their landlord after his death; yet the son could not be relieved against the first settlement.

Old Sir James Clavering having three sons, John, James and the plaintiff Henry, in 1663 settled six hundred pounds *per ann.* on John his eldest son; and having increased his estate, settled about five hundred pounds *per ann.* on James his second son; and in 1684, settled the manor of Lamedon on trustees, in trust from and after his decease, to pay to the plaintiff his third son for life (he having been extravagant, and in disgrace with his father), and likewise to pay his daughter Katharine one hundred pounds *per ann.* for her life; and to pay the surplus profits to Sir James his grandson, and after the death of the annuitants to convey the said manor to his said grandson Sir James and his heirs. After this old Sir James, having greatly increased his estate, in the year 1690, without regard to the settlement of 1684, conveyed the manor of Lamedon to the plaintiff for life, and to his first and other sons in tail, remainder to James and his first \*and other [\*474] sons in tail; remainder to his grandson Sir James, and his first and other sons in tail; and about the same time made another provision for his daughter Katharine, by assigning to her a mortgage of eighteen hundred pounds; and in 1697, by will devised his personal estate to be invested in lands, and settled on Sir James for life, and his first and other sons in tail; which personal estate was of the value of fifteen thousand pounds, or thereabouts. After the death of old Sir James, the plaintiff entered and took possession of Lamedon, and received the arrears of rent, which were devised to him by the will of his father, who



No. 1. — *Clavering v. Clavering*, 2 Vern. 474, 475.

intended the arrears to go along with the estate; but Sir James, having found the settlement of 1684, got the tenants to attorn to him.

The plaintiff's bill was to be relieved against the settlement of 1684, and to have the benefit of the conveyance of 1690. And for the plaintiff it was insisted, he was proper to be relieved in equity; because it appeared on the proofs, that old Sir James had never delivered out or published the settlement of 1684, but had it in his own power, and it was after his death found amongst his waste papers; and it is to be presumed, he apprehended he had a power either to change or alter it, as he thought fit; he having always had it in his own possession or power, or possibly might have forgotten it; the deed of 1690 being often mentioned by Sir James, as the settlement of Lamedon, and so indorsed with his own hand; and in his lifetime he told the tenants, that the plaintiff was to be their landlord after his decease; and the defendant had no reason to complain, his grandfather having by lands, and

the devise of his personal estate, left him an estate of three [\*475] thousand pounds *per annum*, great part of which he was not

obliged to leave him by settlement or otherwise, but out of his bounty to his grandson; so that if in the settlement of 1690, he had done him any wrong, he had given him an ample recompense, by leaving to him estates that were indisputably in his power to have given to the plaintiff, instead of Lamedon, had he been informed or apprised that it was not in his power to have given Lamedon to the plaintiff; but that the voluntary dormant settlement of 1684 would take place; and it would be very hard upon the plaintiff, who had no other provision; whereas James the second son had at least five hundred pounds *per annum* settled on him by old Sir James.

LORD KEEPER declared, he was sufficiently satisfied that the manor of Lamedon was intended as a provision for the plaintiff, and that it was but a reasonable provision; yet the case was too hard to be relieved in equity.

First. Admitting it to be the intention of old Sir James, that the plaintiff should have Lamedon; yet that was not a sufficient foundation to decree upon. If a will be prepared and everything done, but it is not published; or, if published, and but one witness to it; if a deed is signed and sealed, and by accident not delivered; in all these cases the intention is plain; yet not relievable

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in equity; so if a will is made by a *feme covert* of lands of inheritance to J. S. and the husband dies, and then the wife; although her intention is plain; and although after the death of her husband, when she became *sui juris*, she might have devised the lands to J. S. or by a republication have made the former will good; yet that case is not relievable in equity.

In the *Lord Lincoln's case*, Show. P. C. p. 154, it was intended the estate should have gone along with the honour, and was so devised by five or six wills successively; but no relief could be had against a subsequent voluntary conveyance, [\* 476] though made for a particular purpose only, which never took effect. It is a common rule in the law, that the first deed and the last will are to take place. Co. Litt. 112 b. And if a prior deed, without more, might be discharged by a subsequent deed, there would never be occasion to insert powers of revocation; and that had been an idle and unnecessary provision in deeds, and would not have been so long used and practised by learned men; and although the settlement in 1684 was always in the custody or power of Sir James, yet that did not give him a power to resume the estate; and although voluntary conveyances, if defective, shall not in many cases be supplied in equity; yet where there hath been a covenant to stand seised to the use of a relation, although it is a voluntary settlement; yet this Court in the ancient of times always executed such uses. In the *Lady Hudson's case*, where the father, having taken displeasure at his son, made an additional jointure on his wife, but kept it in his power; and being afterwards reconciled to his son, cancelled the additional jointure, and died; the wife after his decease found the cancelled deed, and recovered by virtue of it.<sup>1</sup>

And as to the equivalent, or recompense given to Sir James in lieu of Lamedon, the voluntary settlement of 1690 being void by reason of the prior settlement of 1684, cannot give the plaintiff an equivalent out of the personal estate. — A recompense equivalent to a void settlement is nothing at all.

<sup>1</sup> Et vide *Barlow & Ur. v. Heneage*, Pre. Ch. 211, where settlement and bond in favour of children, and objected that they were both voluntary, and always kept by the father (the settlor and obligor) in his own hands, and on bill for an account and satisfaction of the profits of the settled

estate, and the money secured by the bond and interest, *per* LORD KEEPER. "These were the father's deeds and he could not derogate from them." — But decree there at last made upon agreement between the parties.

Dismissed the bill as to any relief against the deed of 1684, but decreed the payment of the annuity and arrears.<sup>1</sup>

*Note.* Afterwards this decree was affirmed upon an appeal to the Lords in Parliament.<sup>2</sup>

### Doe d. Garnons v. Knight.

5 Barn. & Cress. 671–696 (s. c. 8 Dow. & Ry. 348).

#### *Deed. — Execution. — Delivery.*

[671] Where a party to any instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential.

Delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.

This was an ejectment brought to recover possession of certain messuages and lands in the county of Flint. The lessor of the plaintiff claimed the property as mortgagee under a deed purporting to be executed by W. Wynne deceased. At the trial before GARROW, B., at the Summer assizes for the county of Stafford, 1825, the principal question turned on the validity of that deed; and the following appeared to be the facts of the case: Wynne was an attorney residing at Mold in Flintshire, and had acted in that character for Garnons, the lessor of the plaintiff, who resided at a distance of about three miles from Mold. Wynne's sister and niece lived in a house adjoining to his own at Mold. On the 12th of April, 1820, about six o'clock in the evening, Wynne called at his sister's house, his niece then being the only person at home, and asked her to witness or sign some parchment. He produced the parchment, placed it on the table, signed his name, and then said, "I deliver this as my act and deed," putting his finger at the

<sup>1</sup> 26th January. "And as to the arrears of the rents of the said estate at Lamedon, due at the said testator's death, the plaintiff is at liberty in the names of the defendants, the executors of old Sir James Clavering, to sue for and recover

the same arrears." Reg. Lib. 1704. A. fol. 186. No costs given.

<sup>2</sup> Bro. P. C., 122. Vide *Villers v Beaumont*, 1 Vern. 100, and cases cited in note there. *Clarell v. Littleton*, Pre. Ch. 305.

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No. 2. — Doe d. Garnons v. Knight, 5 Barn. & Cress. 671–673.

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same time on the seal; the niece signed her name, and he took it away with him. The deed remained on the table until he took it away. He did not mention to his niece the contents of the deed, or the name of Mr. Garnons. The niece had no authority from Mr. Garnons to receive anything for him. It was proved by Miss Elizabeth Wynne, \*the sister of Wynne, that in [\*672] April 1820, (but whether before or after the execution of the deed as above mentioned did not distinctly appear) he brought her a brown paper parcel, and said, "Here, Bess, keep this: it belongs to Mr. Garnons." Nothing further passed at this time; but a few days after he came again, and asked for the parcel, and she gave it to him: he returned it back to her again on the 14th, 15th, or 16th of April, saying, "Here, put this by." When she received it the second time, it was less in bulk than before. Wynne died in August, 1820. After his funeral, she delivered this parcel to one Barker in the same state in which she received it from her brother. Barker, who was an intimate friend of Wynne, stated that the latter in July, 1814 sent for him, and told him that he had received upwards of £26,000 upon Mr. Garnons' account; and after taking credit for sums he had paid, and placed out for Mr. Garnons, he was still indebted to him in more than £13,000. He then asked the witness, if he, as his (Wynne's) friend, would see Mr. Garnons to explain the circumstances. The witness consented, and Wynne then made a statement of his property; by which it appeared that after payment of his debts, including the £13,000, he would have a surplus for himself and family of £8000 at the least. He desired the witness to tell Garnons that although he could not pay him at that time, he would take care to make him perfectly secure for all the monies due from him. Upon this being communicated to Garnons he desired Barker to assure Wynne, that he would not then distress him, or expose his circumstances, but he expected that he would provide him securities for the money he, Wynne, owed him. This was communicated to Wynne, who expressed great \*gratitude to Gar- [\*673] nons, and said, he would take care to make him perfectly secure. After the funeral of Wynne, his will was produced, and with it was a paper in his own handwriting, containing a statement of his property, and a list of various debts secured by mortgage or bond, and among others, under the title "mortgage," there was stated to be a debt to Mr. Garnons for £10,000. Miss Wynne



soon after delivered to the witness, Barker, a brown paper parcel sealed, but not directed. Upon this being opened, there was inclosed in it another white paper parcel directed, in the handwriting of Wynne, "Richard Garnons, Esq." Within it was a mortgage deed (the same that was witnessed by Wynne's niece, as before stated) from Wynne to Garnons for £10,000. There was also within the white parcel, a paper folded in the form of a letter directed in the handwriting of Wynne to Mr. Garnons. That contained a statement of the account between Wynne and Garnons, and £10,000, part of the balance due from Wynne to Garnons, was stated to be secured upon Wynne's property. The mortgage deed found in the parcel was then delivered to Garnons. It was a mortgage of all Wynne's real estates. It was contended on the part of the defendant that nothing passed by the deed, inasmuch as there had been no sufficient delivery of it to the mortgagee, or to any person on his behalf, to make it valid; and, secondly, because it was fraudulent and void against the creditors of the grantor under the statute 13 Eliz. c. 5. The learned Judge overruled the objections, and the defendant then proved that Mr. Wynne, in May, 1820, had delivered to him a bond and mortgage of his real estates, to secure money due from Wynne to him: and that by his will he

devised all his estates to the defendant, Knight, in trust to [\* 674] sell and pay \*his debts. It was further proved, that about

the 5th of April a skin of parchment with a £12 stamp was prepared by Wynne's order, and for a few days he remained in his private room, with the door shut. A clerk entered the room, and found him writing upon a parchment: he afterwards locked the door. There was no draft of the mortgage in the office, and he never mentioned it. The whole of the deed was in Wynne's own handwriting. He had three clerks, and deeds were in the usual course of business executed in the office, and witnessed by himself and his clerks. The learned Judge told the jury, that the first question for their consideration was, whether the mortgage to the lessor of the plaintiff was duly executed by Wynne the deceased; but that if they thought it was originally well executed, the question for their consideration would be, whether the delivery to Mrs. Elizabeth Wynne was a good delivery; and he told them he was of opinion, that if, after it was formally executed, Mr. Wynne had delivered it to a friend of Mr. Garnons, or to his banker for his use, such delivery would have been sufficient to vest in Mr

## No. 2. — Doe d. Garnons v. Knight, 5 Barn. &amp; Cress. 674-687.

Garnons the interest intended to be conveyed to him under it; and the question for them to decide was, whether the delivery to Miss Wynne was, under all the circumstances of the case, a departing with the possession of the deed, and of the power and control over it, for the benefit of Mr. Garnons, and to be delivered to him either in Mr. Wynne's lifetime or after his death; or whether it was delivered to Miss Wynne merely for safe custody as the depository, and subject to his future control and disposition. If they were of opinion that it was delivered merely for the latter purpose, they should find for the defendant, otherwise for the plaintiff. A verdict having been found for the plaintiff, Campbell \* in last Michaelmas term obtained a rule *nisi* [\* 675] for a new trial, upon two grounds: first, that there had not been a sufficient delivery of the deed; and, secondly, that it was fraudulent as against creditors or purchasers within the stat. 13 El. c. 5, or 27 El. c. 4. Upon the first point he contended, that delivery was necessary to the execution of a deed; that there could be no good delivery unless made to the party intended to be benefited by it, or to some person acting on his behalf, or to a stranger expressly for his use; and he relied upon Sheppard's Touchstone, 57, where it is laid down, "that a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him, or it may be delivered to any stranger for and on the behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger without any such declaration, intention, or intimation, unless it be in a case where it is delivered as an escrow, it seems this is not a sufficient delivery:" and he contended, that in this case there was not any delivery to the mortgagee, or to any person on his behalf on the 12th of April; and that the subsequent delivery to Miss Wynne was not sufficient, because it did not put the deed out of the control of Mr. Wynne, and there was no evidence to warrant the finding of the jury that Mr. Wynne had parted with the control.

After argument, the Court took time for consideration.

\* BAYLEY, J., now delivered the judgment of the Court. [\* 687]

There were two points in this case. One, whether there was an effectual delivery of a mortgage deed, under which the lessor of the plaintiff claimed, so as to make the mortgage operate. The other, whether such mortgage was or was not void against creditors or a subsequent mortgagee. Upon the first point the facts

were shortly these. In July, 1814, Mr. Wynne, an attorney, who was seized in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (Wynne) had misapplied above £10,000 of his (Garnons') money. Garnons answered, he relied and expected that Wynne would provide him securities for his money; and Wynne said he would make him perfectly secure, and he should be no loser. On the 12th of April, 1820, Wynne went to his sister's, who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece, and used the words: "I deliver this as my act and deed." The niece, by his desire, attested the execution, and then Mr. Wynne took it away. The niece knew not what the deed was, nor was Mr. Garnons' name mentioned. In the same month of April he delivered a brown paper parcel to his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons." He came for it again in a few days, and she gave it him; and he returned it on the 14th, 15th, or 16th of April, saying, "Here, put this by." It was then less in bulk than before, and contained the mortgage in question. Mr. Wynne died the 10th of August following, and after his death the parcel was opened, and the mortgage found. Mr. Garnons knew nothing of the mortgage until after it was so found. My [\* 688] Brother GARROW, who tried the cause, left two \* questions to the jury; one, whether the mortgage was duly executed; the other, whether the delivery to the sister was a good delivery; and he explained to them, that if the delivery was a departing with the possession, and of the power and control over the deed for the benefit of Mr. Garnons, in order that it might be delivered to him either in Mr. Wynne's lifetime, or after his death, the delivery would be good; but if it was delivered to the sister for safe custody only for Mr. Wynne, and to be subject to his future control and disposition, it was not a good delivery, and they ought to find for the defendant. The jury found for the plaintiff. Their opinion, therefore, was, that Mr. Wynne parted with the possession and all power and control over the deed, and that the sister held it for Mr. Garnons, free from the control and disposition of the brother. It was urged upon the argument, that there was no evidence to warrant this finding, and that the conclusion which the jury drew had no premises upon which it can be supported. Is this objection, however, valid? Why did Mr. Wynne part with

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the possession to his sister, except to put it out of his own control? Why did he say when he delivered the first parcel, "It belongs to Mr. Garnons," if he did not mean her to understand, that it was to be held for Mr. Garnons' use? And though the sister did return it to her brother when he asked for it, would she not have been justified had she refused? Might she not have said, "You told me it belonged to Mr. Garnons, and I will part with it to no one but with his concurrence." The finding, therefore, of the jury, if this be a material point, appears to me well warranted by the evidence, and then there will be two questions upon the first point: one, whether when a deed is duly signed and sealed, and formally delivered with apt words of delivery, but \*is [\* 689] retained by the party executing it, that retention will obstruct the operation of the deed; the other, whether if delivery from such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the person who is to be benefited by it, until after the death of the party by whom it was executed. Upon the first question, whether a deed will operate as a deed though it is never parted with by the person who executed it, there are many authorities to show that it will. In *Barlow v. Heneage*, Prec. Cha. 211, George Heneage executed a deed purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, and gave bond to the same trustees conditioned to pay to them £1000 at a certain day, in trust for his daughters; but he kept both deed and bond in his own power, and received the profits of the estate till he died: he noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly. It was urged, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only. Lord Keeper WRIGHT said, these were the father's deeds, and he could not derogate from them; and the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only; but that decree was, that interest should be paid upon the bond from the time when the condition made the

\*money payable. In *Clavering v. Clavering*, p. 577, *ante*, [\* 690]



Prec. Cha. 235, 2 Vern. 473, 1 Bro. Parl. Cas. 122, Sir James Clavering settled an estate upon one son in 1684, and in 1690 made a settlement of the same estate upon another son: he never delivered out or published the settlement of 1684, but had it in his own power, and it was found after his death amongst his waste papers: see 2 Vern. 474, 475. A bill was filed under the settlement of 1690, for relief against the settlement of 1684; but Lord Keeper WRIGHT held, the relief could not be granted, and observed, that though the settlement of 1684 was always in the custody or power of Sir James, that did not give him a power to resume the estate, and he dismissed the bill. In *Lady Hudson's case*, cited by Lord Keeper WRIGHT, a father, being displeased with his son, executed a deed giving his wife £100 *per annum* in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, cancelled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord SOMERS dismissed the bill. In *Naldred v. Gilham*, 1 Pr. Wms. 577, Mrs. Naldred in 1707 executed a deed, by which she covenanted to stand seised to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement: a copy of this deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish this copy, and to have the second settlement delivered up; and Sir JOSEPH JEKYL determined, with great clearness, for the plaintiff, [\*691] and granted a perpetual \*injunction against the defendant, who claimed under the second settlement. It is true, Lord Chancellor PARKER reversed this decree; but it was not on the ground that the deed was not well executed, or that it was not binding because Mrs. Naldred had kept it in her possession, but because it was plain that she intended to keep the estate in her own power: that she designed that there should have been a power of revocation in the settlement; that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon, by the deed's being made an absolute conveyance, which was unreasonable, when it ought to have had a power of revocation, and because the plaintiff, if he had any title, had a title at law, and had, therefore, no business

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in a court of equity. Lord PARKER's decision, therefore, is consistent with the position that a deed, in general, may be valid, though it remains under the control of the party who executes it, not at variance with it; and so it is clearly considered in *Boughton v. Boughton*, 1 Atk. 625. In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. Lord HARDWICKE considered it as valid, and acted upon it; and he distinguished it from *Naldred v. Gilham*, which he said was not applicable to every case, but depended upon particular circumstances; and he described Lord MACCLESFIELD as having stated, as the ground of his decree, that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking (or rather of reserving a \* power to revoke). Upon these authorities, it [\* 692] seems to me, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on *Doe v. Roberts*, 2 B. & Ald. 367 (20 R. R. 477), because there the brother who executed the deed, though he retained the title-deeds, parted with the deed which he executed.

But if this point were doubtful, can there be any question but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit (*per* Lord ELLENBOROUGH in *Sterling v. Vaughan*, 11 East, 629, 11 R. R. 280), and there is the strongest ground here for presuming Mr. Garnons' assent, because of his declaration that he relied and expected Mr. Wynne would provide him security for his money, and Wynne had given an answer importing that he would. Shepherd, who is particularly strict in requiring that the deed should pass from the possession of the grantor (and more strict than the cases I have stated imply to be necessary), lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger for his use and

on his behalf. Shep. 57. And 2 Roll. Abr. (K.) 24, pl. 7. *Taw v. Bury*, Dyer, 167 b, 1 Anders. 4, and *Alford v. Lea*, 2 Leon.

111, Cro. Eliz. 54, and 3 Co. 27, are clear authorities, that, [\*693] on a delivery to a stranger for the \* use and on the behalf of the grantee, the deed will operate *instantly*, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this: "If a man make an obligation to I., and deliver it to B., if I. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant, 3 H. VI., 27." The point is put *arguendo* by Paston, Serjt., in 3 H. VI., who adds, "for a servant may do what is for his master's advantage, what is to his disadvantage not." In *Taw v. Bury* an executor sued upon a bond: the defendant pleaded, that he caused the bond to be written and sealed, and delivered it to Calmady to deliver to the testator as defendant's deed; that Calmady offered to deliver it to testator as defendant's deed, and the testator refused to accept it as such; wherefore Calmady left it with testator as a schedule, and not as defendant's deed, and so *non est factum*. On demurrer on this and another ground, Sir HENRY BROWN and DYER, Justices, held, that, first, by the delivery of it to Calmady, without speaking of it as the defendant's deed, the deed was good, and was in law the deed of defendant before any delivery over to the testator, and then testator's refusal could not undo it as defendant's deed from the beginning; and they gave judgment for the plaintiff, very much against the opinion of the Chief Justice Sir ANTHONY BROWN, but others of The King's Bench, says Dyer, agreed to that judgment. It was afterwards reversed, however, for a discontinuance in the pleadings. Sir A. BROWN's doubt might possibly be grounded on this, that the delivery to Calmady was conditional, if the testator would accept it; and if so, it would not invalidate the position, which alone is material here, that an unconditional delivery to a [\*694] stranger \* for the benefit of the grantee will enure immediately to the benefit of the grantee, and will make the deed a perfect deed, without any concurrence by the grantee. And this is further proved by *Alford v. Lea*, 2 Leon. 110; Cro. Eliz. 54. That was debt upon an arbitration bond; the award directed, that before the Feast of Saint Peter both parties should release to each other all actions. Defendant executed a release on the eve of the feast, and delivered it to Prim to the use of the plaintiff, but the

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plaintiff did not know of it until after the feast, and then he disagreed to it, and whether this was a performance of the condition was the question. It was urged that it was not, for the release took no effect till agreement of the releasee. It was answered, it was immediately a release, and defendant could not plead *non est factum*, or countermand it, and plaintiff might agree to it when he pleased. And it was adjudged to be a good performance of the condition, no place being appointed for delivering it, and the defendant might not be able to find the plaintiff, and they relied on *Taw's case*. This, therefore, was a confirmation, at a distance of twenty-eight years, of *Taw v. Bury*; and at a still later period (33 Eliz.), it was again confirmed in the great case of *Butler v. Baker*, 3 Co. Rep. 26 b. Lord COKE explains this point very satisfactorily. "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently. But if C. offer it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force; (but, perhaps, in such case, A. in an action brought on this obligation cannot plead *non est factum*, because it was once his deed), and therewith agrees Hil. 1 Eliz., *Taw's case*, S. P. Bro. Ab. Donee, pl. 29; 8 Vin. 488. The \*same law of a gift of [\*695] goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested, and such disagreement need not be in a Court of record. Note, reader, by this resolution you will not be led into error by certain opinions delivered by the way and without premeditation, in 7 Ed. IV., 7, &c. and other books *obiter*." <sup>1</sup> Upon these authorities we are of opinion that the delivery of this deed by Wynne, and putting it into the possession of his sister, made it a good and valid deed at least from the time it was put into the sister's possession.

The remaining question then is this, whether this deed is void as against creditors under the 13 Eliz. c. 5, or as against defendant as a purchaser under 27 Eliz. c. 4? As to creditors, there was no proof of outstanding debts at the time of the trial, nor any proof of there being any creditor except the defendant, and he may be considered in the double character of creditor and purchaser. The facts in evidence as to him are merely these: that in May or June, 1820, Mr. Wynne delivered to his son a bond and mortgage

<sup>1</sup> GOULD, J., cites this doctrine in *Wankford v. Wankford*, Salk. 301.



for defendant and title deeds, and the mortgage and title deeds related to the same premises as Mr. Garnons' mortgage. What was the nature of the defendant's debt did not appear, or what was the consideration for the bond and mortgage. Whether any money was advanced when such bond and mortgage was given, or whether it was for a pre-existing debt, whether it was obtained by pressure from the defendant, or given voluntarily and of his own motion by Mr. Wynne, and whether the defendant knew of it or not, are points upon which there was no proof, and under [\* 696] these \*circumstances we cannot say the defendant made out a case to entitle him to treat Mr. Garnons' deed as void under either of the statutes of Elizabeth. Should he be able hereafter to show that his mortgage is entitled to a preference, the present verdict will be no bar to his claim. For these reasons we are of opinion that the rule for a new trial must be discharged.

*Rule discharged.*

#### ENGLISH NOTES.

In *Sear v. Ashwell* (1739), 3 Swanst. 411, A. devised his estate to B. and his wife and their heirs. B., after his wife's death, intending to marry again, made a settlement to trustees for 500 years, in the nature of a mortgage, with a condition that if his heirs or executors paid £300 to his eldest son, and £200 each to his younger son and daughter, the term would cease. B. married C. The defendant then sent for the former settlement and burnt it. It was held by the LORD CHANCELLOR that the younger children were entitled to the benefit of the settlement, the deed being complete at the moment of its execution.

In *Bolton v. Bolton* (1739), 3 Swanst. 414, the facts were: A. settled his estate on himself for life, remainder to his wife for life, remainder to his first and other sons in tail; and in default of such issue, limited a term of 500 years to trustees to raise £2000 for each of his daughters; the ultimate remainder was to the right heirs of A. A. had only female issue. By a deed, which recited that he had promised to give to a gentleman who had married one of his daughters, £3000, and his estate, and that he had altered his mind, A. charged his estate with £4000 for each of his children, gave some other gifts, and bound himself, and his heirs, executors, etc., in the sum of £25,000 to his children, their executors, etc., if all the estate was not equally divided among them. Subsequently, by his will A. made a different disposition of his property. The action was against the devisees and trustees to have the deed carried into execution. The LORD CHANCELLOR said: "As this is a deed formerly executed in the lifetime of A., and a voluntary settle-

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ment without a power of revocation, it will not be subject to a revocation by the will; for if it was, there would be no difference between a deed with a power of revocation and one without it."

In *Worrall v. Jacobs* (1817), 3 Mer. 256, the effect of a power of revocation was considered. There, A. had on his marriage settled his estates on himself for life, remainder to his wife for life, remainder to the children of the marriage in tail, remainder to his own right heirs in fee simple. On separation from his wife, he executed a separation deed, wherein he covenanted with a trustee for the wife, in consideration of being indemnified from all debts and engagements which might be contracted by her during the separation, to release his remainder in fee under the settlement, to such uses as the wife should by deed or will appoint. The wife was also given a power to revoke the uses of such deed or will. The wife by deed executed the power of appointment, but without reserving to herself a power of revocation; and she retained this deed in her possession. Subsequently by another instrument she revoked the appointment. It was decided by Sir WILLIAM GRANT, MASTER OF THE ROLLS, on the authority of *Clavering v. Clavering*, that, as the deed of appointment by the wife did not contain a power of revocation, — though such power was contained in the instrument creating the power — the revocation of the trusts in the deed of appointment was bad.

In *Exton v. Scott* (1833), 6 Sim. 31, A. received moneys belonging to B. He then privately and without any communication with B., prepared and executed a mortgage to B. for the amount. A. retained the deed in his custody for 12 years, and then died insolvent. After his death the deed was discovered in a chest containing the title-deeds. It was held that, in absence of evidence that the deed was executed conditionally, it was effective against A.'s creditors.

In *Petre v. Espinasse* (1834), 2 My. & K. 496, the plaintiff, P. W. Petre, conveyed all his interest in the property of his late brother, George Petre, to the defendant, Robert Espinasse, upon trust to pay, at his discretion and with the consent of the plaintiff and of his elder brother Henry Petre, the creditors of the plaintiff, and to apply any part of the balance of the property or its income, or both, as Henry Petre should think proper, to the benefit of the plaintiff; and on the death of the plaintiff, to hold the residue of the property in trust for all and every child or children which the plaintiff might have by any future marriage; and in default of issue, in trust for the plaintiff absolutely. The deed also gave a power of revocation to the plaintiff, to be exercised with the consent of the defendant and Henry Petre. The plaintiff now prayed to have the deed annulled. It was held he could not annul the deed, for "a person cannot himself recall a voluntary deed which he has executed for the benefit of his children."

In *Bill v. Cureton* (1835), 2 My. & K. 503, a single woman, not immediately contemplating marriage, transferred a sum of stock to trustees of whom the defendant was one, upon trust to pay the dividends to herself until she should marry; and after her marriage upon trust to pay the dividends to her separate use for her life; and after her decease to pay the same to her husband for his life, or until his bankruptcy, and afterwards in trust for the children of the settlor; and in default of such children, in trust for herself absolutely. She then mortgaged her interest under the deed to the defendant, for advances made by him. She now filed a bill for the revocation of the deed, alleging that she executed the deed only with the object of protecting herself against the importunities of impecunious relatives; that she never contemplated marriage, and that the deed was voluntary. Sir C. PEPPYS, M. R., declared the settlement to be irrevocable, for a voluntary settlement, where the trust is actually created, is binding upon the settlor. Neither could the mortgagee obtain any relief in the suit.

These cases were cited in argument in *Beatson v. Beatson* (1841), 12 Sim. 281, but distinguished. There, a single lady, having under a will a general power of appointment over a fund vested in the trustees of the will, made a voluntary appointment of it to trustees in trust for her separate use for life; remainder for any husband she might marry, for life; remainder for the children of such marriage. A few months afterwards, while still unmarried, she revoked this appointment (although she had not reserved any power to do so), and made another voluntary appointment of the fund, to other trustees, in trust as she should by deed or will appoint. She then married, and afterwards, by virtue of the last-mentioned power, executed a third voluntary deed by which she declared that the trustees of the first deed of appointment should stand possessed of the funds in trust as she or her husband should appoint, and in default, in trust for her husband and herself for their lives, successively, remainder in trust for the children. The funds still remained in the names of the trustees of the will. The Court decreed the transfer of the funds from the trustees of the will to the trustees of the last-mentioned deed, thus making the revocation of the first deed of appointment effective. The case is easily distinguishable from *Petre v. Espinasse* and *Bill v. Cureton*, *supra*, inasmuch as the first deed of appointment did not operate as a complete conveyance, the property not having been transferred to the trustees of the deed; and equity will not help a volunteer. See notes to No. 1 of "Contract," 6 R. C. 5, 6, and *Smith v. Warde* (1845), 15 Sim. 56; *Searle v. Law* (1846), 15 Sim. 95.

In *Hall v. Palmer* (1844), 13 L. J. Ch. 352, a bond was executed by A. in favour of his mistress, and delivered to his solicitor. The woman did not know of the gift until after A.'s death, but she was held

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entitled to the benefit of the bond. So in *Fletcher v. Fletcher* (1845), 14 L. J. Ch. 66, a voluntary deed of covenant by A. for payment of money to trustees in trust for his two natural sons, B. and C., was held after A.'s death to be binding on his executors, although the existence of the deed was, in his lifetime, unknown to the trustees or to B. or C.

*Palmer v. Newell* (1856), 8 DeG. M. & G. 20 Beav. 32, 25 L. J. Ch. 461, was similar to *Clavering v. Clavering*. There two voluntary deeds were executed in favour of persons to whom the grantor stood *in loco parentis*, and such persons were held entitled to the benefit of both the deeds.

In *Xenos v. Wickham* (1867), L. R., 2 H. L. 296, 36 L. J. C. P. 313, all these cases were cited, and the principal case of *Doe d. Garnons v. Knight* approved and followed. The facts were these: A., a broker, was instructed to effect for B. an insurance on B.'s ship. The policy was prepared, and was sent to A.'s office "duly sealed, signed, and delivered." A. then expressed a desire that the policy should be cancelled, and, the underwriters assenting, the policy was in form cancelled. The ship was lost, and B. made his claim for the loss. It was held that, as the policy had been duly executed, it was irrevocable as against B., without his consent, and that the subsequent act of A. (which was beyond any authority actual or presumable) afforded no answer to the claim. The consulted Judges and the learned Lords laid down that a policy "sealed, signed, and delivered" is complete and binding as against the party executing it, though in fact it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it; and further, that it is not necessary that the assured should formally accept or take away a policy in order to make the delivery complete.

There is an apparent exception to the irrevocability of a duly executed deed in the case where the deed is for the benefit of the creditors of the grantor who have not assented to the deed.

Thus in *Walwyn v. Coutts* (1815), 3 Mer. 707, 3 Sim. 14, 17 R. R. 173, a father conveyed estates to trustees for paying off annuities granted by his son, together with the arrears, and also the son's debts, if they thought proper to pay them, remainder to himself for life, remainder to his son in fee simple. The annuities were mentioned in a schedule, but the annuitants were not parties to the deed. The father and the son then executed other deeds varying the former trusts. A motion by one of the creditors to restrain the trustees from executing the trusts of the subsequent deeds until they had performed the trusts of the first was refused.

*Garrard v. Lauderdale* (1830), 3 Sim. 1, was decided on the authority of this case. There A. made a conveyance of his property to trustees for payment of the debts due to scheduled creditors, who did not execute



the deed, or conform to its terms. It was held that the creditors could not enforce the deed. The VICE-CHANCELLOR, Sir L. SHADWELL, in delivering judgment, said: "Now the question is, what is fairly to be inferred from that order (the order in *Walwyn v. Coutts*); and having had an opportunity of considering this since the motion was mentioned to me, it appears to me that the principle on which Lord ELDON acted when he pronounced that order must be taken to be consistent with that which he has repeatedly declared to be the established law of this court, *viz.*, that where there is an actual settlement made for vesting an estate in trustees, or for vesting stocks in trustees for volunteers, there the legal character being complete, the persons who have the legal character are trustees for the volunteers, who may claim against the *cestui que trusts* against the trustees under the deed. I apprehend that the principle of the two decisions in *Ellison v. Ellison* (6 Ves. 656, 6 R. R. 19) and *Pulvertoft v. Pulvertoft* (18 Ves. 84, 11 R. R. 151), and of this in *Walwyn v. Coutts*, *supra*, are reconcilable with each other; because I apprehend that Lord ELDON must have considered that where a person does, without the privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition, as between himself and trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit, and that the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of showing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers. . . . It was said, however, by the plaintiffs' counsel, that, in this particular case, the creditors must be entitled to the benefit given by the deeds on account of the letter that was written by Mr. Humphries (solicitor to the defendants, the trustees, and the Duke of York, the grantor of the deed). The letter was written to the solicitors of the plaintiff, who had filed his bill for the execution of the trusts in the deed, saying that the Duke had assigned his property for the payment of his debts, and that the plaintiff's name was put down in the schedule of the creditors). Now in the first place, it is not admitted by the answer that that letter was received, and even if it had been received, it does not appear that the creditors ever submitted to take the benefit of the deed, or conformed to its terms, or abstained from suing the Duke. . . . My opinion therefore is that, according to the principle of the decision in *Walwyn v. Coutts*, the creditors would not have had any right to enforce the deed, even if it had appeared that the letter before alluded to had been received by them, inasmuch as they did not, by signing and sealing that deed, make themselves parties to it." This decision was affirmed by the LORD CHANCELLOR (Lord COTTENHAM) in 1831. 2 Russ. & My. 451.

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This case was followed in *Acton v. Woodgate* (1834), 2 My. & K. 492, the facts of which were similar to *Garrard v. Lauderdale*. The MASTER OF THE ROLLS, Sir JOHN LEACH, said: "It is established by the authorities which have been referred to, that, if a debtor conveys property in trust for the benefit of his creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and, before any payment made by his agent, or communicated by him to the creditors, had recalled the money so delivered." The same principle was applied in *Malcolm v. Scott* (1843), 3 Hare, 39, 6 Hare, 570, *Drever v. Maudesley* (1849), 16 Sim. 511, *Johns v. James* (1878), 8 Ch. D. 744, 47 L. J. Ch. 853.

The right of revoking such a trust for creditors is personal to the grantor. If the trust was intended to take effect after the grantor's death, it cannot after his death be revoked by his representatives; still less by persons who claim as beneficiaries under the same deed. *Paterson v. Murphy* (1853), 11 Hare, 88; *Fitzgerald v. White* (C. A. 1888), 37 Ch. D. 18, 57 L. J. Ch. 594, 57 L. T. 706, 36 W. R. 385. In the last mentioned case, freehold estates were, subject to existing mortgages, settled by a voluntary deed to the use of the settlor for life, and subject thereto to the use of trustees for a term of 500 years, and subject thereto to the eldest son of the settlor for life, with remainder to his first and other sons in tail, with remainders over. The trusts of the term of 500 years were, after the death of the settlor, for a period of 21 years to raise an annual sum of £1000 out of the rents and profits, and to accumulate that sum and the income thereof in the way of compound interest by investment, and to apply the accumulations towards the satisfaction of all the mortgage debts charged on the settled property. The first tenant in tail barred the entail, and limited the property, subject to the mortgage but free from the trusts including those of the term of 500 years, to himself in fee simple. He then claimed the accumulated funds and the whole of the future rents. It was held that he had no power to revoke the trust as to the term of 500 years, which was ordered to be continued.

The effect of the communication of the trust to the creditors has been thus explained by Sir J. ROMILLY, M. R., in *Biron v. Mount* (1855), 24 Beav. 649, 24 L. J. Ch. 191, "The principle is well laid down by Lord ST. LEONARDS in *Field v. Donoughmore* (1 Dr. & War. 227) where he states 'It is not absolutely essential that the creditor should execute the deed; if he has assented to it, and if he has acquiesced in it, or acted under its provision and complied with its terms, the settled law of the

Court is that he is entitled to its benefits.' About that I entertain no doubt; but I apprehend he must do some acts which amount to acquiescence, and it is not sufficient if he merely stands by and takes no part at all in the matter, unless it should happen, as in *Nicholson v. Tatin* (2 Kay & J. 23), that from standing by he has lost some remedy; but in the general case, he must do some act."

A trust-deed in favour of creditors is not revocable as against a creditor who has executed it. *Mackinnon v. Stewart* (1850), 1 Sim. N. S. 88; *LaTouche v. Earl of Laran* (1840), 7 Cl. & Fin. 772; *Cosser v. Rodford* (1861), 1 De G. J. & S. 585; *Montefiore v. Browne* (1858), 7 H. L. Cas. 241. But a creditor who has delayed the execution of the deed, or has set up a title adverse to the deed, is outside its benefit. *Gould v. Robertson* (1851), 4 DeG. & S. 509; *Watson v. Knight* (1854), 19 Beav. 369, *In re Meredith*, *Meredith v. Facey* (1885), 29 Ch. D. 745, 54 L. J. Ch. 1106.

A voluntary assignment for payment of debts with an ultimate trust for wife and children is not revocable by the settlor. *Godfrey v. Poole* (J. C. 1888), 13 App. Cas. 497, 57 L. J. P. C. 78, 58 L. T. 685, 37 W. R. 357.

#### AMERICAN NOTES.

The American cases — at least some of them — seem to go even further than the principal case. Neither of the principal cases is cited in Devlin on Deeds, but that author says that "Actual manual delivery and change of possession are not required in order to constitute an effectual delivery," and that delivery depends on the intention of the grantor. So "where a father had indicated in various ways that certain property should be bestowed at his death upon his infant son, and for that purpose had executed a deed, of which however he retained the possession, effect was given to his intention, despite the fact that there had been no manual delivery of the deed." *McClure v. Colclough*, 17 Alabama, 96, citing *Doe v. Knight*; *Newton v. Bealer*, 41 Iowa, 334; *Shirley v. Ayers*, 14 Ohio, 307; 45 Am. Dec. 546; *Walker v. Walker*, 42 Illinois, 311, 89 Am. Dec. 445; *Rogers v. Carg*, 47 Missouri, 232; *Martin v. Flaharty*, 13 Montana, 96; 19 Lawyers' Rep. Annotated, 242 — "Delivery is complete when an intention is manifested on the part of the grantor to make the instrument his deed;" citing *Doe v. Knight*, and giving a very exhaustive analysis of the authorities. See *Standiford v. Standiford*, 97 Missouri, 231; 3 Lawyers' Rep. Annotated, 299.

"A formal, ceremonious delivering of a deed is not essential to its validity. If no condition be annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing, and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor or grantor." *Farrar v. Bridges*, 5 Humphreys (Tennessee), 411; 42 Am. Dec. 439.

"Where a grantor intends, when executing a deed, to be understood as de-

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livering it, that will be sufficient." *Hoyes v. Boylan*, 141 Illinois, 400; 33 Am. St. Rep. 326.

*Doe v. Knight* is cited in *Fain v. Smith*, 14 Oregon, 82; 58 Am. Rep. 281, where it was decided that where a father executed a deed to his two young children, but retained it in his own possession, and continued to occupy and enjoy the premises until his death, this alone did not confer title. See note 58 Am. Rep. 289.

So a deed signed, acknowledged, and recorded is a complete and valid deed, though there is no evidence of any formal delivery, and the instrument is found among the grantor's papers at his death. *Scrugham v. Wood*, 15 Wendell (New York), 545; 30 Am. Dec. 75; *Snider v. Luckenour*, 2 Iredell Equity (Nor. Car.), 360; 38 Am. Dec. 685; *Tobin v. Bass*, 85 Missouri, 651; 55 Am. Rep. 392.

Delivery may be by words without acts, or by acts without words, to grantee, or a third person who has no special authority, for the grantee's use, and the grantee need not be personally present. *Wellborn v. Weaver*, 17 Georgia, 267; 63 Am. Dec. 235; *Chess v. Chess*, 1 Penrose & Watts (Penn.), 32; 21 Am. Dec. 350; *Church v. Gilman*, 15 Wendell (New York), 656; 30 Am. Dec. 82.

Delivery was effectual where the grantor handed the completed deed to the grantee and told him to have it recorded, although it was left in the grantor's possession and found among his papers after his death. *Tyler v. Hall*, 106 Missouri, 313; 27 Am. State Rep. 337, 343.

In *Scrugham v. Wood*, *supra*, the decision was founded on the authority of *Doe v. Gannons*, and of Chancellor Kent, in his Commentaries, and in *Sowerby v. Arden*, 1 Johnson Chancery, 240, in which last case he reviewed the English decisions, citing *Clavering v. Clavering*.

Delivery to the register for record is an effectual delivery if done with the grantee's present knowledge and shown to have been intended as a delivery, and to be accepted, but not otherwise. *Parmelee v. Simpson*, 5 Wallace (U. S. Sup. Ct.), 81; *Maynard v. Maynard*, 10 Massachusetts, 456; 6 Am. Dec. 116; *Pennsylvania Co. v. Dorey*, 64 Pennsylvania State, 260; *Folly v. Van Tuyl*, 9 New Jersey Law, 153; *Jackson v. Leck*, 12 Wendell (New York), 105; *Hatch v. Bates*, 54 Maine, 136; *Cooper v. Jackson*, 4 Wisconsin, 549; *Boody v. Davis*, 20 New Hampshire, 149; *Jackson v. Cleveland*, 15 Michigan, 101; *Somers v. Pumphrey*, 24 Indiana, 240; *Borns v. Hatch*, 3 New Hampshire, 304; 14 Am. Dec. 359; *Hawkes v. Pike*, 105 Massachusetts, 560; 7 Am. Rep. 551; *Union M. Ins. Co. v. Campbell*, 95 Illinois, 237; 35 Am. Rep. 166; *Weber v. Christen*, 121 Illinois, 91; 2 Am. St. Rep. 68; *Lewis v. Watson*, 98 Alabama, 479; 22 Lawyers' Rep. Annotated, 297. The grantee's subsequent information of the leaving of the deed for record, and his assent to it, will render the delivery effectual. *Lee v. Fletcher*, 46 Minnesota, 49; 12 Lawyers' Rep. Annotated, 171.

But merely leaving the executed and acknowledged deed in the hands of the officer who takes the acknowledgment is not a delivery. *Blight v. Schenck*, 10 Pennsylvania State, 285; 51 Am. Dec. 478; *Lady Superior v. McNamara*, 3 Barbour Chancery (New York), 375; 49 Am. Dec. 181; *Newlin v. Osborne*, 4 Jones Law (Nor. Car.), 157; 67 Am. Dec. 269; *Burke v. Adams*, 80 Missouri, 504; 50 Am. Rep. 510.



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 No. 3. — Bowker and Another v. Burdekin. — Rule.
 

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There must be some act or words indicative of an intention to part permanently with dominion over the instrument to constitute a valid delivery. *Tyler v. Hall*, 106 Missouri, 313; 27 Am. St. Rep. 337; *Porter v. Woodhouse*, 59 Connecticut, 568; 21 Am. St. Rep. 131; *Schuffert v. Grote*, 88 Michigan, 650; 26 Am. St. Rep. 316. So in *Williams v. Schutz*, 42 Ohio State, 47, although it was admitted that delivery "need not be manual," and "no particular form or ceremony is essential," yet where A. executed a deed to his son, and said to B., "Take this deed and keep it; if I get well I will call for it; if I don't, give it to Billy," the grantee, this was no delivery.

To the same purport is *Huey v. Huey*, 65 Missouri, 689, citing both principal cases, and *Jackson v. Phipps*, 12 Johnson (New York), 421, where Spencer, J., admirably expressed the true doctrine, as follows: "This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be both; but by one or both of these it must be made."

So in *Schuffert v. Grote*, 88 Michigan, 650; 26 Am. St. Rep. 316, a completed and acknowledged deed was handed by the grantor to the grantee, his son, and immediately returned by him, the grantor saying that he "calculated" to deed the property to the son, but would not like to see it go on record in his lifetime, and the grantee replying that he need not be afraid of its going on record, and that he could keep it himself, this showed no delivery nor any intention to convey either possession or title until the grantor's death.

## No. 3. — BOWKER v. BURDEKIN.

(EX. 1843.)

## No. 4. — GUDGEN v. BESSET.

(Q. B. 1856.)

## RULE.

IN order that the delivery of a deed may only take effect upon a certain condition being performed, it is not necessary that the condition should be expressed in words; and although in form the instrument is delivered as a deed, yet if from evidence of the circumstances attending the execution it appears that the instrument was only to take effect subject to a condition precedent, the operation is suspended accordingly, and in the meantime the instrument is regarded as an escrow or a mere unexecuted writing.

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12 L. J. Ex. 329-336 (s. c. 11 M. &amp; W. 128).

*Deed — Execution by one of Several — Eserow.*

If one only of several partners execute a deed, which on the face of it [329] purports to convey for himself and the other partners all their personal property, the deed operates to convey the share of that one; and where one of two partners executed such an assignment of the partnership property before, and the other did not execute it until after a fiat in bankruptcy had issued: — Held, in the absence of anything to show that the deed was delivered as an escrow, that the former had committed an act of bankruptcy.

In order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words; and though in form it is delivered as a deed, if from circumstances attending the execution, and from the result, it would be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it would operate as an escrow.

Trover by the plaintiffs, as the assignees of three bankrupts, Richard, John, and James Potter, who had formerly carried on a co-partnership business as cotton-spinners and manufacturers at Manchester, against the Bank of Manchester, sued in the name of their registered public officer.

An interpleader order, dated the 24th of November 1841, was made by this Court, on the application of the sheriff of Lancashire, in a cause in which the Bank of Manchester were plaintiffs, and the said bankrupts were defendants; and it directed “that the said assignees bring an action of trover against the judgment creditor (the plaintiffs), to which he is to be at liberty to plead specially, so as to put in issue the validity of the fiat in bankruptcy, and the right to the proceeds under the execution.” And the Court ordered that the sheriff should sell the goods seized, and pay the proceeds into Court.

Under the authority of this order the assignees brought this action to recover the value of certain goods and chattels seized by the said sheriff, under an execution issued under a warrant of attorney, given by the bankrupts to the Bank of Manchester.

The defendant pleaded several pleas, one of them a general denial of the bankruptcy, and gave notice of his intention to dispute the petitioning creditor's debt, and the act or acts of bankruptcy, on which the fiat was awarded against the said bankrupts.

At the trial, before MAULE, J., at the Lancashire Summer As-

sizes, 1842, the plaintiffs proved various acts of bankruptcy committed by James and John Potter; and with the view to establish an act of bankruptcy against Richard, they put in a deed of assignment to one W. V. Cross, for the benefit of creditors, whereby "they (the said Richard Potter, John Potter, and James Potter) did, and each of them did, grant, bargain, sell, assign, transfer, and set over unto the said W. V. C., his executors, administrators, and assigns, all and every the stock in trade, wares, merchandise, fixtures, household and other goods, leasehold estates, chattels of every description, sum and sums of money, debts due and owing, ready monies and securities for money, books, papers, writings, and all other the personal estate and effects whatsoever and wheresoever of them, the said Richard Potter, John Potter, and James Potter, and all the estate, right, title, interest, benefit, claim, and demand of the said Richard Potter, John Potter, and James Potter, of, in, to, or out of the same respectively; to have, hold, receive, and take the said stock in trade, wares, merchandise, fixtures, goods, leasehold estates, chattels, sum and sums of money, personal estate, effects, and premises, mentioned to be thereby assigned, and all benefit thereof, under the said W. V. C., his executors, administrators, and assigns, upon trust, nevertheless, that he, the said W. V. C., his executors or administrators, would and should, with all convenient speed, absolutely sell and dispose of all the said estate and effects in their nature saleable, either by public auction or private contract, and either together in one lot or otherwise, for the best price or prices and most money that could be obtained for

the same, and collect and receive all the debts and sums [\* 330] of money \* due and owing as aforesaid, and stand possessed of the money arising under these presents, upon the trusts hereinafter mentioned; and the said Richard Potter, John Potter, and James Potter, did thereby make, ordain, constitute, and appoint the said W. V. C., his executors or administrators, to be the true and lawful attorney and attornies for them, the said parties thereto, of the first part, their executors and administrators, and in their name or names, or in the name or names of the said attorney or attornies, or otherwise, to collect, and by legal proceedings or otherwise to recover and receive, all and every the debts and other the premises as amply as the said parties thereto of the first part, their executors or administrators, could do, if personally present, with full power and authority to substitute one or more attorney

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or attornies under them with like or limited powers. And it was thereby declared that the said trustee, his executors or administrators, should stand possessed of the monies which should arise or be received under those presents, in trust, after payment and retention of all costs, charges, rents, taxes, and expenses, which might be sustained in or about those presents, or the execution of the trusts and powers thereof, to pay, divide, and distribute the same unto and amongst all and every the creditors of the said Richard Potter, John Potter, and James Potter, who should come in and execute those presents, or otherwise signify their assent thereto, and also prove their debts by declaration to be made under the act of parliament for the abolition of extra-judicial oaths, before a competent authority (if required by the said trustee), on or before the 1st day of October next, and their respective executors, administrators, and assigns, in proportion to the several debts due and owing to them respectively from the said Richard Potter, John Potter, and James Potter; the same distribution to be made by an equal pound-rate, according to the amount of their said several debts respectively, and without any preference whatsoever. And the said parties thereto of the first part, did thereby, for themselves, their heirs, executors, and administrators, covenant, promise, and agree to and with the said W. V. C., his executors and administrators, that they, the said parties thereto of the first part, should and would, to the best of their power, forthwith make and deliver a true and exact account in writing of all their debts and affairs, and aid and assist the said trustee in the management of the affairs of the said trust estate, and should not receive or intermeddle with any of the said estate, but confirm and allow all and whatsoever the said trustee should lawfully do, or cause to be done, in or about the premises. And it was thereby agreed and declared, that it should be lawful for the said trustee to employ the said parties thereto of the first part, or any other person or persons, in winding up the said trust estate and premises, and in collecting, getting in, and disposing of the same, or any part thereof, and also in carrying on the business (if the same shall be carried on by the said trustee), and to allow to the said parties thereto of the first part, or any of them, or any other person or persons so employed as aforesaid, out of the said trust estate, monies and premises, such sum and sums as to the said trustee shall seem proper; and the said several persons parties thereto of the third part, in considera-



tion of the premises, did thereby, for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and partners, covenant, promise, and agree with and to the said parties thereto of the first part, their heirs, executors, and administrators, that they, the said parties thereto of the third part, should and would accept and take the dividend and dividends to be made under and in pursuance of those presents in full satisfaction and discharge of their several debts then owing to them respectively by the said parties thereto of the first part, and should not, nor would at any time thereafter, sue, arrest, attach, take in execution, or otherwise impede or incumber him, the said W. V. C., in any manner, on account of their said several debts; and if any of them should do so, contrary to the intent and meaning of those presents, that then the said parties thereto of the first part, their heirs, executors, and administrators, should be, and is and are, for ever thereby declared to be clearly acquitted, exonerated, and discharged of and from all actions, suits, debts, and demands whatsoever of the creditor or creditors by whom he should be so sued, arrested, attached, taken in execution, or otherwise impeded or incumbered. and \* those presents may be pleaded in bar thereto, as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be. Provided always, that the said trustee shall be at liberty to make all fair and usual charges for all such matters and things as may be done by him relative to the said trust estate, and should not be charged with or accountable for any monies or effects, other than such as should actually come to his hands by virtue of those presents, nor with or for any loss or damage which might happen in or about the execution of the trust aforesaid, without his wilful neglect or default. And further, the said trustee was thereby authorized and empowered to pay or make such arrangement with the creditors whose debts were under £5, as the said trustee might deem expedient. And it was thereby agreed, that whenever the funds, arising from the sale of any part of the estate and effects, or from the collection of the debts owing to the said estate, should amount to £100 or upwards, that the amount thereof should be paid into the banking-house of Messrs. Jones, Loyd, & Co., bankers in Manchester, in the name of the said trustee, and that the cheques or orders for drawing out the said money, or any part thereof, should be signed by the said trustee."

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This deed was executed by Richard Potter on the 8th of September, by John Potter on the 6th of September, and by James Potter on the 13th of September; the fiat was issued on the 13th, after the execution by Richard, and before the execution by James. For the defendant it was contended, that no act of bankruptcy, on which to found the fiat, had been established against Richard, inasmuch as the assignment being a joint deed, and not having been executed by James, the intended third party to it, until after the fiat, it had no existence in law at the time the fiat issued. The case went to the jury, who found that acts of bankruptcy had been committed by John and James, independently of the assignment, and, with respect to Richard, that he had committed an act of bankruptcy by executing the assignment, and not otherwise. The plaintiffs had a verdict for £15,000, and the learned Judge certified on the record, that the acts of bankruptcy were proved, reserving leave to move to enter a nonsuit.

In Michaelmas term, —

Platt moved for a rule to show cause why a nonsuit should not be entered, and why the damages should not be reduced to the amount which the sheriff had paid into Court. He read the judgment of Lord ELDON in *Dutton v. Morrison*, 17 Ves. 193; 1 Rose 213 (11 R. R. 55); and, with regard to the damages, he urged, that as this was an action of trover directed by the Court to try the right to the proceeds, viz., the sum paid into Court, the plaintiffs had no right to go into evidence as to the value of the goods. The rule was granted on both points.

Knowles, Tomlinson, and Hoggins now showed cause. The plaintiffs are not desirous of opposing the reduction of the amount of damages.

[PARKE, B. The Court were of opinion, when the rule was granted, that you ought to be confined to the proceeds of the goods.]

Then the question for the Court will be, whether Richard Potter committed an act of bankruptcy in executing the assignment proved at the trial. The rule of law, that deeds take effect, not from the time of their date, but from the time of delivery, is too clear to be disputed; Shep. Touch. 72. Now the act of bankruptcy in this case is compound; there must be a fraudulent intent to delay creditors, and there must be the execution of the conveyance. The fraudulent intent is the main ingredient, and must be referred to the moment of delivery, because a deed cannot become fraudu-

lent by matter *ex post facto*; here unquestionably the fraudulent intent existed, as found by the jury on the 8th of September, when Richard Potter executed the deed. Why should it be said that the deed had no operation then? The rule is the same as to chattels, as in the case of real property, viz., that if one joint tenant conveys away the joint property, or his share of it, he thereby severs the joint tenancy; and, as to his share, the conveyance is effectual. *Deane d. Bowyer v. Judge*, 11 East, 288 (10 R. R. 511). *Dutton v. Morrison*, is relied on by the defendant. There Lord ELDON said, "The question then is, whether, within the principle of those decisions, this deed is an act of bankruptcy; attending to the true intent and effect of it, taken altogether; to [\*332] what was intended to be \*done, and what is to be considered as not intended; if the whole that was intended was not capable of being done. Admitting that this was not intended to be a several deed, but the creditors, through the mutual agreement of all, were to derive a benefit against each, if two retired from that agreement, and no bankruptcy had occurred, could the creditors have taken advantage of the deed against the one who executed, but who, it must be admitted, did not mean to execute, so as to give the deed any effect, unless the others devoted their shares of the property to the same purpose? I doubt whether that would be the legal effect; as in many cases the law considers a variety of instruments as forming one transaction, and would not give effect to any instrument, unless the whole transaction was completed. If this instrument had been delivered as an escrow, there could be no doubt; and if it was delivered by one only, for no other reason but that the others could not execute, has that act any effect, preventing his continuing a trader, or dedicating his property to any person whatsoever? Under such circumstances I am unwilling to decide this question myself; the more so, from reflecting upon the necessity of extreme caution in determining what is an act of bankruptcy, and the consequences that may follow in criminal proceedings from permitting a commission to issue, or to go on upon a doubtful act of bankruptcy, which a recent instance has forcibly impressed on my mind. Unless, therefore, you have other acts of bankruptcy, a case ought to be directed." There were other acts of bankruptcy, and it did not therefore become necessary to direct a case; and all that is expressed by Lord ELDON is a doubt on his Lordship's mind at the time, whether any interest

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would pass, having reference to the intention of the parties: a doubt upon facts rather than upon the law. In that case the deed never was made complete, and so far it is distinguishable from the present case. And there is another very material distinction. Lord ELDON, laying great stress on the circumstance, says "Admitting that this was not intended to be a several deed," so that the deed must be taken to have been entirely a joint deed; whereas, in the present case, the deed is several as well as joint, for it uses the words, "they" (the bankrupts) "do and each of them doth," &c., from which we may collect the intention. It cannot be contended, that this deed was delivered as an escrow, which is the only case in which it would not take effect from the time of its first delivery. It was not delivered to a stranger, but to a party who was to take the benefit under it, and it was not accompanied by the apt words necessary to make an escrow. It will probably be said, that the old cases on this subject are overruled, and that apt words are not necessary, but that the jury are to form an opinion from all the circumstances, whether the intent was to deliver absolutely or conditionally; here, however, no such question was ever put to the jury. In *Johnson v. Baker*, 4 B. & Ald. 440 (23 R. R. 338), it was unquestionably decided, that what is termed, in Sheppard's Touchstone, and other books, apt words of delivery were not necessary, but there the deed was delivered, not to a party interested, but to a stranger, so that the old law is not overruled by that case. *Murray v. The Earl of Stair*, 2 B. & C. 82, goes a little further, but the same observation is applicable to that case; and in both those cases, though there were no apt words of delivery, there was something said at the time of execution to make it conditional. Here it is not pretended that any words were used, or that anything passed at the time of execution to indicate any second delivery; the delivery was clearly absolute. But in the case of an escrow, the deed does not take effect in all cases from the second delivery, for in some instances it has relation back to the date of the first delivery, and the reason, as given in Vin. Abr., is, that the second delivery is the only delivery of it as a deed. In *Graham v. Graham*, 1 Ves. jun. 274, EYRE, C. B. says, "The counsel for the plaintiff agree, that Dr. Graham could not have been compelled to do any act to complete his voluntary bounty, but insist that he had completed the bounty he had intended, and could not recall it; and particularly his executors



could not. At law these bonds must be considered as escrows, to be delivered to the obligee upon performance of the condition; and then they take effect from their original sealing and delivery; and the rule of law is, that though the obligor and obligee are [4333] both \*dead before the condition performed, yet upon performance of it the bond is good to charge assets." As an authority, his Lordship cited *Perryman's Case*, 5 Co. Rep. 84, in which it was so decided by Lord COKE. [He then referred to *Doct. Garraons v. Knight*, p. 580, *ante*, 5 B. & C. 671; 4 L. J. K. B. 161, as bearing on the subject.] But further it is submitted, that the moment a party executes an assignment of his property, thereby depriving himself of the means of carrying on his trade, and distributing his property amongst his creditors, that moment he commits an act of bankruptcy, although the deed remains in his own possession, and is never acted upon at all. The case of *Batcherby v. Lancaster*, 1 Ad. & El. 77; 3 L. J. (N. S.) K. B. 157, is to that effect. That was an action of trover against the assignees, who relied upon a deed as an act of bankruptcy. It was an assignment by bankrupts to one Brown of their effects for the benefit of creditors. The attesting witness proved it was executed on the day on which it bore date, but he did not know under what circumstances, nor at the time did he know the contents of it. The deed was executed by the bankrupts, but not by any of the creditors. It appeared to have been exhibited to the commissioners, but there was no evidence of its having been acted upon. Sir F. POLLOCK contended, that the deed did not constitute an act of bankruptcy, it being produced by the assignees, without evidence that it was ever in the custody of any person for the benefit of creditors, or even out of the bankrupt's possession. And Lord DENMAN said, "I do not think that it is open to the Court to go into the question now raised, but I have no doubt that the assignment was an act of bankruptcy." LITTLEDALE, J. entertained the same impression; and PARKE, J. and PATTESON, J. had no doubt the conveyance was an act of bankruptcy. *Tappenden v. Burgess*, 4 East, 230; 1 Smith, 33, is also an authority to show that an assignment is an act of bankruptcy. The jury here have found the execution of this deed to have been with an intention to delay creditors; and it is submitted, that this rule must be discharged.

Wortley and W. H. Watson, in support of the rule. The real question here is, whether this deed had any operation at all before

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the fiat; whether it operated to transfer any of the goods of the bankrupts. The words of the Act of Parliament are, “any fraudulent grant or conveyance,” &c., or “any fraudulent gifts, delivery, or transfer,” &c. The deed purports to be a conveyance of the joint property of the three, for the benefit of the creditors, not of each severally, but of the three, as co-partners in business. It contains a power of attorney to the trustees from three, and therefore until executed by all, it is inoperative, because there would be no power to collect in the debts. However, the trustee is to sell the stock in trade, and divide the proceeds amongst the creditors, which he could have no power to do, until all the partners had signed the deed, — no power to act in the trusts. This deed is in the nature of an escrow on the face of it. The creditors thereby undertook to receive a dividend; and that must be on the property of all three. It is a deed of mutual obligation: and if the creditors were not bound, you could not enforce it against Richard. Lord ELDON’s doubt was, whether it could be enforced against a party who had executed it. *Graham v. Graham and Perryman’s Case* decided only, that where a deed is delivered as an escrow, when it afterwards becomes complete, it takes effect for some purposes from the time of delivery. The case of *Deane v. Judge* has nothing to do with the present; it merely establishes that a simple conveyance by three out of five trustees conveys the estate of the three. In that case there were no mutual conditions or stipulations to affect the conveyance. *Hooper v. Ramsbottom*, 6 Taunt. 12, only decided, that when the deed is delivered as an escrow it is out of the control of the vendor. *Botcherby v. Lancaster* does not appear to have been much discussed; and the only question there was, whether a conveyance perfect in all other respects had any operation as a conveyance of the property, notwithstanding it had been kept in the grantor’s own possession, and not acted upon or put in force. Those cases, therefore, do not at all affect this question. But the question here is, whether this conveyance \* looking at who were the conveying parties [\* 334] to it, their relative position to each other, and their relation to the parties of the third part, and the object of the deed, can have any effect until it is executed by all; and if so, can it be complete so as to constitute an act of bankruptcy within the meaning of the Act of Parliament, until it is executed by all the three partners? They cited also *Gordon v. Wilkinson*, 8 T. R. 507, and *Higgins v. M’Adam*, 3 You. & Jer. 1.

LORD ABINGER, C. B. I am clearly of opinion, that this rule ought to be discharged. It appears to me, that the jury have correctly found, that this deed was executed by the party in question with a view to delay creditors, and to defeat the object of the bankrupt laws. If a man executes a deed, by which he conveys his property away, with a view fraudulently to defeat his creditors, or to evade the bankrupt laws, that is an act of bankruptcy. Mr. Wortley contends that this deed could not take effect — that it was executed by the last of the three parties who did execute it, after the fiat, and, therefore, that the previous execution goes for nothing. It appears to me, however, that the act of bankruptcy of each party is complete at the time he executes the deed. Suppose the third partner had died before he executed the deed at all, could that have altered the nature of this deed as regards the other two? They did what in themselves at that moment lay, by the execution of a deed, to convey away their effects in fraud of the bankrupt laws; and the subsequent death of a partner could not alter that act. Richard Potter executed the deed on the 8th, and James not until the 13th. Suppose, that between the 8th and the 13th, Richard had died, and that James had executed the deed in due time before the fiat, Mr. Wortley's argument, if it is to prevail at all, would show that the effect of that would be, that Richard's property did not pass until such time as the last partner had executed the deed, and therefore, that his property passed to his executors, and vested a beneficial interest in them. I think that could not be the case. I think the property vested immediately upon the act of bankruptcy, in whoever might be the lawful commissioner. If he had executed the deed expressly upon a condition that his partner should execute it afterwards, and that had been proved to the satisfaction of the jury, and they had found that, the deed would then have been inoperative till the last partner had executed. But that is not so; the deed is executed by him, to take such effect as he could give to it at the moment, and it does pass all his property in the joint effects, at least to the assignee. Whether the assignee might do with it as the parties intended he should do with it, if the other parties did not execute it, is another question; but surely it vested in the assignee all the property. He transferred it out of himself; and therefore, even supposing that he alone had intended to commit an act of bankruptcy, would not the conveyance of all his joint interest in that property,

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which was to pay his debts and his partner's, if he had made that conveyance, with a view to defeat his creditors, have been an act of bankruptcy, though the others had not executed it? It appears to me, this has the effect of vesting the property in the assignee the whole of such property as he could pass by that deed, because he did not deliver it as an escrow, but delivered it as a deed immediately to take effect at that moment, and it did take effect. Though the effect may not be altogether that which he contemplated, yet the legal effect is to place the goods and the property in the hands of the assignee, and to divest it out of him. That is all that I think is required by the Act of Parliament, to make it an act of bankruptcy. I cannot consider that there is any evidence in this case of an intention to deliver it in the nature of an escrow. There is nothing to show, that Lord ELDON, in the case cited, had any doubt that that fact might be inferred, but whether he could, sitting as Chancellor, say it was an act of bankruptcy, without referring it to a jury; he does not say, if the jury were to find it was not delivered as an escrow, and that the party executed the deed, and delivered it simply, that would not be an act of bankruptcy; and observe, the doubt he raises is, whether, as Chancellor, he ought to infer that to be so, without having the intervention of a jury. \* You have here the finding of the jury [\* 335] that the deed was executed with a view to defeat the bankrupt laws.

PARKE, B. I am of the same opinion, and I think this rule must be discharged. With respect to the point to which Mr. Wortley has directed a great deal of his argument, whether this commission could be supported, if this was a deed executed as an escrow on the 8th of September, and which did not take effect as a complete conveyance until the 13th, in that portion of the day after the fiat was issued — if that were a question in the case, I own I should concur with him, because I think it necessary, in order to support the fiat, which is granted on an act of bankruptcy by a fraudulent conveyance, that there should be, at the time of it, in every portion of the day on which the fiat was issued, some complete fraudulent conveyance, by which the property was divested from the bankrupt; and in the event of this having been delivered as an escrow, not to take effect until a condition was performed, which was not to be performed until a subsequent time, after the fiat, I think there would have been no fraudulent



conveyance within the meaning of the bankrupt laws, and, therefore, that the fiat could not be supported. That is on the assumption that this deed was to be delivered as an escrow. That, however, is a fact we are not to assume at all, but the reverse; because, on looking at the learned Judge's note, I take it to be clear, that this point of delivery, not as an escrow, was conceded — in truth, it was a deed executed in the ordinary form, as an absolute conveyance; and the only point that was made was, whether a deed which was executed as an absolute conveyance, would not be an act of bankruptcy, because, on looking at the form of the deed itself, you might come possibly to the conclusion, that the parties did not contemplate that the deed should operate as an act of bankruptcy, unless the whole partnership effects were conveyed. In this case, the execution of the deed was proved in the ordinary form, and I take it now to be settled (though the law was otherwise in ancient times, as appears by Sheppard's Touchstone), that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution, all that took place at the time, and to the result of the thing; and therefore, though it is in form delivered as a deed, yet if it really would be inferred it was delivered not to take effect as a deed till a certain condition was performed, then it would have operated as an escrow. That is the result of the two cases cited in argument, *Johnson v. Baker* and *Murray v. The Earl of Stair*. But there is no fact of that kind in this case; the execution took place in the ordinary way; there is nothing in the circumstances of the case to lead to an inference but that the deed was intended to be executed by each of the partners. What is its legal effect? Here is one partner who executes a deed which, on the face of it, purports to convey for himself and others, all the personal property of the partners, and, according to the authority in Sheppard's Touchstone, such a deed as that would operate to convey all the separate effects of the person who executed it, that is, of Richard Potter, and it would certainly convey to them all the share that Richard Potter had in the joint effects. That would, in point of law, operate as an act of bankruptcy. If a man parts with all his personal estate and all his share in the joint effects in a business in which he acts as a trader, that unquestionably amounts, in point of law, to an act of bankruptcy; therefore, the simple question here is, the deed

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having that operation, whether there is anything to be collected from the face of the deed itself, from which you can say it was to have no operation: I own I cannot come to that conclusion. It seems probable, the parties contemplated the other partners should execute the deed, but in the meantime the party has set his seal, and delivered the deed as an instrument which conveys all the property he has, and it must operate as an act of bankruptcy. Lord ELDON's opinion in *Dutton v. Morrison* is not a decided opinion, but he merely expresses a doubt. He would not hold that instrument to be an act of bankruptcy, without sending for the opinion of a court of law. We are sitting in a court of law, and I think we cannot deny to an instrument executed as a deed the effect of transferring the property, according to the terms of the deed, of the \*party who executes it; and if [\* 336] that is all the property he has, or all the share he has in the property, with which he carries on business, that, in point of law, amounts to an act of bankruptcy, and operates as such. With all deference for the doubt of such a distinguished lawyer as Lord ELDON, in *Dutton v. Morrison*, I own it appears to me, unless the deed is executed as an escrow, it at once operates to convey all the property the partner has, and therefore is an act of bankruptcy.

ALDERSON, B. I am of the same opinion. This deed is delivered in the ordinary form, and not as an escrow. There are no circumstances attending the execution of the deed itself which at all have a tendency to show the deed was delivered as an escrow. Then we look into the deed, and we find certain circumstances on which the counsel for the plaintiff rely, which makes them conclude that it would have been a very convenient thing if it had been delivered as an escrow, for the purpose of carrying into effect more precisely the supposed intention of the parties to the deed — a very doubtful question; but that is the whole extent of the argument: and are we to infer, when there are no circumstances attending the actual execution of it to show it was so executed, that it was executed as an escrow, because it would have been convenient that it should have been so executed?

GURNEY, B. I am of the same opinion. It appears to me the deed was quite complete, and that it operated from the time of its execution. I agree, if it had been delivered as an escrow, it would have been different.

*Rule discharged.*

**Gudgen v. Besset.**

26 L. J. Q. B. 36-39 (s. c. 6 El. &amp; Bl. 986, 3 Jur. n. s. 212).

*Lease by Deed. — Delivery. — Implied Condition.*

[36] A lease of premises from the plaintiff to P., containing the usual words "signed, sealed, and delivered," was executed by both parties, pursuant to a previous agreement to let, in which the annual rent was stated to be £55, and by which it was agreed that P. should pay £100 for the plaintiff's goodwill and fixtures, and that the lease should not be delivered, but remain in the plaintiff's possession until the whole of the £100 was paid. P. paid £50 of that sum and entered into possession and carried on the business of a baker, the plaintiff keeping possession of the lease. P. became bankrupt without paying the remaining £50, the lease still remaining with the plaintiff. The defendant became assignee in bankruptcy: — Held, in an action for use and occupation (it appearing that the defendant had accepted the tenancy), that the [\* 37] evidence warranted the jury in finding \*that there had been no delivery of the deed so as to operate as a lease, and that until the payment of the remaining £55 only a tenancy from year to year existed, and, therefore, that the defendant was liable for rent in an action for use and occupation.

This was an action to recover a half-year's rent for the use and occupation of a dwelling-house, shop, and premises of the plaintiff.

Plea — Never indebted.

On the trial, before WIGHTMAN, J., at the Sittings at Guildhall, after Trinity term last, it appeared that the plaintiff, in March, 1854, agreed to let the premises in question to W. P. for a term of years, at the annual rent of £55, W. P. agreeing to pay £100 for the plaintiff's goodwill in the business carried on upon the premises and the fixtures. A lease was afterwards prepared and duly executed by the plaintiff and W. P. The lease was not attested, but contained the usual words "signed, sealed, and delivered." W. P. paid £50 of the £100 and entered into possession of the premises, but the lease still remained in the plaintiff's possession, it being part of the agreement between the plaintiff and W. P. that the lease should not be delivered to W. P., but should be kept by the plaintiff until the whole of the £100 had been paid. W. P. afterwards became bankrupt without having paid the £50 remaining due, and the defendant was appointed the creditors' assignee of his effects. At the time of his bankruptcy W. P. was in possession of the premises, carrying on the business of a baker, and at the instance of the defendant the

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messenger in bankruptcy placed a man in possession, who, with W. P., carried on the business for a time with means supplied by the defendant. W. P. afterwards, at the request of the defendant, left the premises, and the defendant then let another person into possession of the premises, under an agreement to carry on the business on certain terms, who remained in possession until Christmas, 1855, and then left, returning the keys to the defendant. A demand of possession was afterwards made upon the defendant, but he refused to pay rent or give up possession unless the plaintiff would agree to certain terms, which the plaintiff declined to do.

A verdict was found for the defendant, leave being reserved to move to enter a verdict for the plaintiff for £27 10s., if the Court should be of opinion that there was any evidence upon which the jury would be warranted in finding a verdict for the plaintiff. A rule *nisi* for this purpose was afterwards obtained, against which —

Petersdorff now showed cause. — This action for use and occupation is not maintainable, as there was no tenancy created between the plaintiff and the defendant. It does not affect the question that there may have been no complete lease granted to W. P. The defendant, being the assignee of W. P., no doubt entered upon the premises in that character; but this is no evidence of an election by him to take to the lease, as the facts proved show that he did so only for the purpose of seeing whether he would take to them as tenant. The jury were not asked whether he did elect to become tenant to the plaintiff. But even supposing the defendant did elect to take to the lease, he ought to be sued as assignee of the lease, and not in use and occupation, which will not lie against a party who takes to a term granted to another. Suppose W. P. had expressly let the defendant into possession, the latter must have paid his rent to W. P., and could not have been sued by the reversioner. If the defendant is treated as wrongfully in possession, that can be only as between him and W. P., but the plaintiff can have no right to sue on that ground.

Mellor and Beasley, in support of the rule. — First, there was abundant evidence of the acceptance of the tenancy in the premises by the defendant as assignee. *Hanson v. Stevenson*, 1 B. & Ald. 303 (19 R. R. 327), and *Clark v. Hume*, Ry. & M. 207. Secondly, use and occupation was the proper form of action. The



parties to the deed never intended that it should operate immediately as a lease. It is not attested.

[Lord CAMPBELL, C. J. That was quite unnecessary.]

It was never the intention of the parties that it should [\* 38] operate as a lease for a term \* of years until the bankrupt had paid the whole of the £100. The word “delivered” in the deed may be controlled by the intention of the parties at the time. *Davis v. Jones*, 25 L. J. C. P. 91, *Pym v. Campbell*, 25 L. J. Q. B. 277, and *Murray v. The Earl of Stair*, 2 B. & C. 82. Until the payment of the remaining £50 the bankrupt was in possession at a rent under the provisional arrangement made. The deed was to be retained by the plaintiff as a security, and it would be no security at all if he were considered as merely an equitable mortgagee. In *Bowker v. Burdekin*, 11 M. & W. 128; 12 L. J. Ex. 329 [*ante*, at p. 610], PARKE, B., in giving judgment, says, “I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard’s Touchstone, that in order to constitute the delivery of a writing as an escrow it is not necessary it should be done by express words, but you are to look at all the facts attending the execution, — to all that took place at the time, and to the result of the transaction: and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow.”

Lord CAMPBELL, C. J. The case of *Bowker v. Burdekin* is an authority for the principle on which I am prepared to give judgment, because it was the intention of all the parties that it should not operate as a lease until the condition was performed. They had no intention that the term should vest in the lessor until the money had been paid. The mere formality of not delivering the deed to a third person as an escrow is not material. Assuming that the bankrupt never had the term, but was only tenant from year to year, upon the terms of the lease, so far as they are applicable to such a tenancy, he could not have been sued upon the lease, and if so, then only for use and occupation. Whatever the bankrupt had in him, the assignees had: and therefore the action must be for use and occupation against him, and the objection taken that the remedy ought to be in covenant is got rid of, because that action could not be maintained. The ground of my judgment is, that the deed was not delivered so as to take effect

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as a lease; and I may add, that I should attach no weight to what was passing at the time in the mind of the lessor, unless assented to by the lessee.

COLERIDGE, J. I also think the rule ought to be made absolute. The question must be determined by the relation in which the bankrupt stood to the plaintiff. If the bankrupt was not in as lessee under the deed, this action may be maintained against the defendant, who has come in under him as assignee. I think, looking at the facts, the proper inference is, that the bankrupt was in under such terms of the lease as were consistent with a tenancy from year to year, but not as lessee under the deed. In the first place, there was a retention of the parchment, which is not conclusive, but, taken in connexion with the relation of the parties, and the other circumstances, is very strong. The other facts are, that one of the terms was, that £100 was to be paid, and that sum was not paid; and they agree that the lessor should not give up the instrument to the bankrupt, and that he should not be lessee until he paid the remaining portion of the £100. I think the evidence is enough to warrant the finding that the bankrupt was, by the arrangement, only to enter as tenant from year to year until the payment of the whole of the £100.

WIGHTMAN, J. The evidence here is, that the defendant had, as assignee, taken possession of premises in which the bankrupt had an interest. The evidence is sufficient to show that the jury were at liberty to find that the defendant had elected to take the premises, and, therefore, in some form, liable to the rent; but the main difficulty that has arisen in this case is, that a lease was granted for a term of years to the bankrupt, and if he held as tenant under that lease, the defendant ought to have been sued in covenant, and is not liable to this action. The question is, whether there is any evidence from which the jury might have inferred that the defendant did not hold under the lease, that though the lease was formally executed, it \* was not [\* 39] the intention of the parties that it should take effect until the whole of the £100 was paid, or immediately pass any interest (because, if it passed what is called an *interesse termini*, I think the entry by the bankrupt would have precluded any objection to an action of covenant brought against him), and that it was left in the hands of the lessor, not merely as equitable mortgagee, but that he might withhold the operation of the deed as a demise.

There are circumstances in the case to warrant such an inference, and if so, the action lies. I was much struck, certainly, with the passage referred to in *Bowker v. Burdekin*.

ERLE, J. The defendant as assignee stands in the place of the bankrupt; and the question is, whether the action would have lain against the bankrupt. Now, the evidence of the plaintiff would have been, "I granted a lease to you, provided you gave me £100 for the grant of the term, and having paid £50, I said you might enter into possession, and should have the lease when you paid the other £50," and if there were no answer to that, it is clear there would have been evidence of a tenancy from year to year until the payment of the other £50 and a claim of the lease. Here, the bankrupt says, the demise was written on parchment, and the words "signed, sealed, and delivered" were used; and therefore the term is in him. I am of opinion, that if it was agreed between the parties that the words should not operate in their legal sense, and as a delivery of the deed, it ought not so to operate. The mind of a man must go with the words in the sense necessary to make them operate as a delivery of the deed. The form was gone through, but it was agreed to be with the intention that the plaintiff was to keep possession of the parchment deed, and that it should not pass as a lease until the payment of the £50. I think the evidence warrants the conclusion that the instrument never was delivered so as to operate as a binding deed; and, therefore, that the present action lies. *Rule absolute.*

#### ENGLISH NOTES.

The cases cited below show some of the chief cases where a deed has been held to be delivered conditionally (as an escrow) or otherwise.

In *Johnson v. Baker* (1821), 4 B. & Ald. 440, 23 R. R. 338, it was agreed by the principal debtor, another person who was to be surety for payment of a composition, and the creditors, that they should execute a composition deed on the condition that the deed would be inoperative unless all the creditors executed it. The surety executed the deed in the ordinary way, and delivered the deed to one of the creditors for execution by the others. The creditors failing to execute, the deed was held to be an escrow, and not binding on the surety.

In *Morran v. Earl of Stair* (1822), 2 B. & C. 82, 3 D. & R. 278, the subscribing witness to a bond stated in evidence that the bond was delivered by the obligor as his deed, but that before and at the time of the execution it was agreed that the bond should remain in the hands

of the witness until death of A., and until certain securities were given up; and that the bond was delivered to him on that condition. The Court held that it was a question of fact for the jury whether the deed was an escrow or a valid deed. The jury had at the trial found the deed to be valid and binding.

*Hare v. Horton* (1833), 5 B. & Ad. 715, 2 N. & M. 428, is an authority for the proposition that possession of the deed by the grantee is *prima facie* evidence that the deed had been delivered to him as a deed, and not as an escrow. *Hall v. Bainbridge* (1848), 12 Q. B. 699, shows that where a deed between two parties purports to be under the hands and seals of both, and the attestation witnesses the "signing and sealing" by both, and the deed is in the hands of one party and is admitted by the other to have been sealed signed and executed as it purports to be, there is evidence of delivery of the deed.

Where an instrument is intended to be executed by several persons, and is executed by one of them on the faith that others will execute it, the mere fact of the former executing does not bind him until execution by all the others. The question of intention in a commercial instrument is a question for a jury. *Latch v. Wedlake* (1846), 11 Ad. & El. 959, 3 P. & D. 499.

In a case where eight children (X., Y., and six others) of A. were entitled to a fund equally in the event of their surviving B., seven of them (X. and the others except Y.), in pursuance of an arrangement made while the eighth (Y.) was abroad, executed a deed by which the eight were made to covenant reciprocally that in case any of them should die in B.'s lifetime leaving children, such children should be entitled to the parent's share. The deed was never executed by Y., who as well as the others except X. survived B. On a claim by the children of X. to have his share in the fund, it was held that the deed having been executed on the assumption that all would execute it, and not having been executed by all, was not binding on those who had executed. *Peto v. Peto* (1849), 16 Sim. 590.

*Leake v. Young* (1856), 5 El. & Bl. 955, 25 L. J. Q. B. 266, shows that where a debtor executes a deed of composition with his creditors, and the provisions of the deed in favour of the creditors are not carried out, the deed has no effect in restraining the creditors from pursuing their ordinary remedies. A. compounded with his creditors for twelve shillings in the pound. B. undertook to pay ten shillings in the pound provided A.'s effects were assigned to him by way of security. The composition deed was executed on this understanding; the creditors took a promissory note from A. for two shillings in the pound, and three bills of exchange accepted by B., each undertaking to pay three shillings and four pence in the pound. B. failed to meet the first bill of exchange



when it fell due. The Court decided that the creditors' right of action revived, and that the deed had merely suspended their rights until the bills were met. A similar decision was given in *Fowler v. Fowler*, decided in the Queen's Bench Division on the 15th July, 1895.

*Pyne v. Campbell* (1856), 6 El. & Bl. 370, 25 L. J. Q. B. 277, is an important authority for the proposition that where an instrument has been duly executed, but with a condition precedent suspending its operation, the instrument is merely an escrow until the condition is performed. This case was followed in *Furness v. Meake* (1858), 27 L. J. Ex. 35. There it was laid down that a deed enclosed with or accompanied by a letter explaining that it has been signed only on the condition of something being done, for instance, a counterpart executed by the other party, is an escrow till that something has been done. Compare with this, *Camberledge v. Lawson* (1857), 1 C. B. (N. S.) 709, 26 L. J. C. P. 120. There A. and two others stood surety for the payment of C.'s debts to D. A. executed the deed of suretyship in the belief that one of the other sureties was also going to execute it. That surety did not execute the deed, which was, however, held binding on A.

A. and his son executed a deed of apprenticeship for the son at the office of C., the solicitor of the employer B. B. being absent, A. requested C. that B. should not be allowed to execute it until arrangements were made as to the expenses. C. made a memorandum on the deed to that effect, and acting upon it did not allow B. to execute the deed. It was held in an action on the deed by B. for breach of its provisions by the apprentice, that it was neither the deed of A. nor of B., but a mere escrow. *Millership v. Brooks* (1860), 5 H. & N. 797, 29 L. J. Ex. 369.

It was agreed that the grantor and the grantee should execute a deed in duplicate, one to be prepared by each party, and to be interchanged between them. The grantee executed his deed, and sent it to the grantor's solicitors to procure its execution by the grantor. The grantor sealed, signed, and delivered it. It was held that the condition as to the duplicates did not make the deed an escrow. *Kidner v. Keith* (1864), 15 C. B. (N. S.) 35.

In *Phillips v. Edwards* (1865), 33 Beav. 440, A. held certain land in trust for the separate use of a married woman, with a power of leasing it with her consent in writing. By a parol agreement A. and the married woman arranged to grant a lease to B., and both she and A. executed the lease, but before their solicitor delivered it to B., she recalled her consent. She had not given a written consent to the trustee for granting the lease. It was held that specific performance of the agreement could not be enforced against her, as there was no deed binding on her.

In *Watkins v. Nash* (1875), L. R. 10 Eq. 262, the grantor delivered

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the deed to the solicitor of the grantee, but on condition that it was not to be made over to the grantee. Held, the deed was only an escrow.

A settlement made in contemplation of marriage, and delivered to but not executed by the husband or the trustees, was allowed to be cancelled after the lapse of 3½ years on the marriage not taking place. *Bond v. Walford* (1886), 32 Ch. D. 238, 55 L. J. Ch. 667, 54 L. T. 672.

Absence of seal from a deed of reconveyance of a mortgage, there being no evidence that it had ever been sealed, renders the reconveyance invalid. *National Provincial Bank of England v. Jackson* (C. A. 1886), 33 Ch. D. 1, 55 L. T. 458, 34 W. R. 597.

## AMERICAN NOTES.

*Bowker v. Burdekin* was cited and followed in *Southern Life Ins. Co. v. Cole*, 4 Florida, 359; and both principal cases are cited in 6 Am. & Eng. Enc. of Law, pp. 866, 867.

“But the strictness of the old rule is greatly relaxed by modern decisions; and if the instrument is delivered as an escrow, and not in name as a deed, it will nevertheless be regarded and construed as a deed from the first delivery, as soon as the event happens, or the consideration is performed upon which the effect had been suspended, if this construction should then be necessary in furtherance of the intention of the parties.” *Hatch v. Hatch*, 9 Massachusetts, 307; 6 Am. Dec. 67; *Price v. Pittsburgh, &c. R. Co.*, 34 Illinois, 13.

“It is not necessary that the term *escrow* should be used, when an instrument is delivered to a third person, in order to prevent its taking immediate effect. That term would perhaps evince more clearly than any other the actual intention of the parties. But where such intention is indicated in any other manner, effect is to be given to it, unless the technical or legal phraseology employed by the parties renders it impracticable. What the nature of the delivery was, whether absolute or conditional, and what were the actual intentions of the parties, are always questions of fact to be settled by the jury, where the evidence leaves any doubt upon the subject.” *Wheelwright v. Wheelwright*, 2 Massachusetts, 447; 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Massachusetts, 307; 6 Am. Dec. 67; *Clark v. Gifford*, 10 Wendell (New York), 310; *Jackson v. Catlin*, 2 Johnson (New York), 248; 3 Am. Dec. 415; *Hathaway v. Payne*, 34 New York, 92.

A deed sent in a letter to a third person, not the agent of the grantee, to be delivered to the grantee upon the payment of money, but not declared in the letter to be an escrow, does not vest the title in him before actual delivery to him on the payment of the money. *White v. Bailey*, 14 Connecticut, 270. “The law is well settled that a deed is delivered as an escrow when the delivery is conditional.” Citing the last three cases. To the same effect: *State Bank v. Evans*, 3 Green Law (New Jersey), 155; 28 Am. Dec. 400, 403; *Stone v. Duwall*, 77 Illinois, 475; *Jackson v. Sheldon*, 22 Maine, 569; *Millett v. Parker*, 2 Metcalfe (Kentucky), 608.

“It is settled that the question whether a deed is to be considered as the deed of the grantor presently, or as an escrow, is to be determined rather from

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the words used and the purposes expressed than upon the name which the parties may happen to give to the instrument." *Foster v. Mansfield*, 3 Metcalf (Mass.), 412.

The Rule is also supported by *Wight v. Shelby R. Co.*, 16 B. Monroe (Kentucky), 4; 63 Am. Dec. 522; *Cannon v. Handley*, 72 California, 133; and by *Martin v. Flaharty*, 13 Montana, 96; 40 Am. St. Rep. 415, a valuable collection of the authorities. It was there held that if a person named as grantor in a conveyance receives of the grantee a lease of the premises for the term of the grantor's life, and both go to a bank and the grantor delivers both instruments to the cashier, with an indorsement thereon directing him to deliver them to the grantor, and in the event of her death to the grantee, and the grantor subsequently speaks of the conveyance as the grantee's deed, these facts justify a finding of delivery of the conveyance, and that it had become operative in the lifetime of the grantor, if she died without having called for the deed. See note, 40 Am. St. Rep. 424.

The doctrine of the Rule is substantially adopted in 1 Devlin on Deeds, sect. 332, citing some of the foregoing cases, and concluding that use of the term "escrow is clearly unnecessary."

It was said in *Jackson v. Sheldon*, 22 Maine, 569, citing *Murray v. Earl of Stair*, 2 B. & C. 82: "The case last named shows that the intention of the parties respecting a delivery is to prevail, and that it is not necessary that there should be an express declaration that it was delivered as an escrow to make it such. That if the delivery was conditional, so as not to constitute any present obligation, it was an escrow and not a deed."

The practical application of the doctrine in question is probably expressed with accuracy for most cases in 6 Am. & Eng. Cyc. of Law, as follows: "When the future delivery is to depend upon the payment of money or the performance of some other condition, it will be deemed an escrow. When it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be generally deemed the grantor's deed presently." But Chancellor Kent said, in 4 Commentaries, 454: "The distinction on this point is quite subtle, and almost too evanescent to be relied on." And in *Prutsman v. Baker*, 30 Wisconsin, 644; 11 Am. Rep. 592, it was said: "This distinction will be found, however, not to be in all cases correct, since it will frequently happen that it will defeat the manifest intention of the parties, which it is conceded should govern." The decision in this case was, that when P., executed a deed to B., and placed it in the hands of S. with instructions to hold it subject to his control until his death, and then to deliver it to B., and on P.'s death S. so delivered it, nothing passed by the deed. The Court further said: "We have said in the first part of this opinion, that so long as a deed is within the control, and subject to the authority of the grantor, there is no delivery for any purpose. A writing cannot be delivered as an escrow even, unless the maker parts with his dominion and power over it until such time as the event has happened when it is to be or may be restored to him. If it is in his own possession, he can of course destroy it at his pleasure, and if in the hands of a third person as his mere agent, and subject to his direction, his power is the same. If this be true of an

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escrow or conditional delivery, it must *a fortiori* be true where the delivery, if made, would necessarily become absolute. The following are some of the authorities which hold that if the deed is subject to be recalled by the grantor, before delivery to the grantee, it is no delivery on the part of the grantor. *Shirley's Lessee v. Ayres*, 14 Ohio, 307; *Fitch v. Bunch*, 30 Cal. 213; *Berry v. Anderson*, 22 Ind. 36; *Cook v. Brown*, 31 N. H. 460. The last is a particularly full and well considered opinion upon the question growing out of a state of facts not dissimilar to those here presented, and many authorities are reviewed.

“Opposed to these decisions we know of but two in the country (*Shed v. Shed*, 3 N. H. 432, and *Belden v. Carter*, 4 Day (Conn. 66), in neither of which was the real point of objection discussed or considered. The former we know has been overruled, and we believe also the latter.<sup>1</sup> In England there have been some decisions and *dicta* to the like effect, as will be seen by examining the oft-cited case of *Doe v. Knight*, 5 Barn. & Cress. 671, 687. In *Welch v. Sackett*, 12 Wis. 265, this Court felt obliged to reject what was said in *Doe v. Knight*, rather *obiter* than otherwise, on the subject of presumed acceptance of a deed by the grantee without knowledge that it had been or was to be executed, and now it feels obliged to reject what was in like manner said respecting the validity of delivery, where the deed remains in the grantor's possession or subject to his control. Upon both points the remarks of the court were strictly unnecessary to a decision of the cause, and, as we think, also clearly erroneous.

“As observed in *Cook v. Brown*, the owner of land desiring to make disposition of it at his death, has three courses open to him, either of which he may adopt according to circumstances and as will best suit his convenience and intentions. ‘If he desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed; or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee. But if he wishes to retain the power of changing the disposition of the property at his pleasure, that can only be properly effected by a will. So long as he retains the instrument, whether in the form of a deed or will, in his power, the property is his.’”

A few cases go to the extreme length of holding that a delivery of a deed as a deed, with an expressed *confidence* that the receiver will not deliver it to the grantee until the performance of some specified condition, is an escrow. *State Bank v. Evans*, 3 Green Law (New Jersey), 155; 28 Am. Dec. 400. But the intention of the grantor may be indicated in this way as well as by an express condition attached to the delivery.

Although no rule is better settled than that “an instrument can never be delivered to the grantee himself” (Co. Litt. 36 *a*), yet Story said, in *Flagg v. Mann*, 2 Sumner (U. S. Cir. Ct.) 487, that “a Court of equity will not govern itself by technical principles of this sort, where the intention of the parties would be thereby defeated,” provided there is the “clearest evidence” of such intention and its defeat. This was cited and followed in *Southern Life, &c. Co. v. Cole*, 4 Florida, 359, 375, where the Court said: “It must be borne in mind that this Court is now sitting as a Court of Equity, which regards not the cir-

<sup>1</sup> See *Stewart v. Stewart*, 5 Conn. 317, 320. — REP.



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circumstances or outward ceremonial, but the substance of the act, and therefore we think that if the respondent had entered the parlor of the Company, the President and Directors being there in session, and by the most formal act had delivered the deeds in question to the head of the Corporation, stating the circumstances under which and to accomplish which they were executed, we should be compelled to regard it as a delivery to take effect only on the final consummation of the contract."

**No. 5. — STEIGLITZ v. EGGINTON.**  
(N. P. 1815.)

**No. 6. — TUPPER v. FOULKES.**  
(C. P. 1861.)

**RULE.**

A POWER of attorney to execute a deed under seal, must itself be under seal. But subsequent informal acts of the principal showing his adoption of the deed, are regarded as equivalent to due execution by him.

**Steiglitz v. Egginton.**

Holt N. P. 141-142 (s. c. 17 R. R. 620).

*Deed. — Execution. — Power.*

[141] An authority to execute a deed must be by deed.

Debt on an award; to which were added common counts for goods sold and delivered, &c. The defendants pleaded: 1. *Non est factum*. 2. That they did not covenant and agree, &c. 3. That they did not submit themselves, &c. There were other pleas, the substance of which was the same as the foregoing.

The plaintiffs were merchants at Petersburg; and some differences having arisen between them and the defendants, an agreement was entered into to submit to the award of Mr. Ludlam. The agreement, which was under seal, was executed by one of the defendants, for "self and partner." On the part of the plaintiffs, it was executed by an agent of the name of John; but he had executed it in his own name, without stating that it was by procuration, or for the plaintiffs. A power of attorney had been

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given by the plaintiffs to John to sign any instruments or documents relating to commercial affairs, in their names, either jointly or severally, or in the names of their attorney.

Vaughan and Parke objected to the execution: —

This deed may bind John, but it cannot bind any other person. An attorney should execute in the name of his principal. The power of attorney is not sufficient: he must be connected with the deed by the deed itself; not by an instrument *dehors*. [142]

His Lordship doubted whether it would be sufficient; but he called upon the plaintiffs to support the execution of the defendants “for self and partner.” They proposed to prove that one of the Eggintons gave authority to the other to execute the deed for him; and that the partner, who did not execute, had subsequently acknowledged the agreement.

Lens and Gaselee contended that this was a substantial execution.

GIBBS, Ch. J. :—

The authority to execute must be by deed. If one partner, who does not execute, acknowledge that he gave an authority, I must presume that it was a legal authority; and that must be under seal and produced. One man cannot authorise another to execute a deed for him but by deed. No subsequent acknowledgment will do. The defendants have pleaded that it is not their deed.

The plaintiffs afterwards proceeded on the common counts, and  
*Recovered a verdict.*

*Reporter’s note.* — If A. execute a deed for himself and [143] his partner, by the authority of his partner, and in his presence, it is a good execution, though only sealed once. *Ball v. Dunsterville*, 4 T. R. 313 (2 R. R. 394). In that case, the Court relied principally on the deed having been executed by one partner for himself and the other, in the presence of the other. See *Lord Lovelace’s case*, Sir W. Jones, 268. One partner cannot bind another by deed. *Harrison v. Jackson*, 7 T. R. 207 (4 R. R. 422). So, one who executes a deed for another under a power of attorney, must execute it in the name of his principal. *Combe’s case*, 9 Co. Rep. 76; *Frontier v. Small*, 2 Ld. Raym. 1418; 1 Strange, 705; *White v. Cuyler*, 6 T. R. 176 (3 R. R. 147). But

though the act done must be the act of the principal, and not of the attorney who is authorised to do it, yet, if the deed be executed in the principal's name, it matters not in what form of words such execution is denoted by the signature of the name; as if opposite the seal be written "for J. B. (the principal), M. W. (the attorney), L. S." *Wilks v. Buck*, No. 7, p. 634, *post*; 2 East, 142 (6 R. R. 409).

### Tupper v. Foulkes.

30 L. J. C. P. 214-216 (s. c. 9 C. B. (N. S.) 797; 7 Jur. N. S. 709; 3 L. T. 741; 9 W. R. 349).

#### *Deed. — Execution by Agent. — Delivery.*

[214] In an action on a covenant which had been entered into by certain creditors of C. (of whom the defendant was one) with the plaintiffs, who were trustees for such creditors, there was an issue taken on a plea of *non est factum*. At the trial there was evidence that the deed had been signed for the defendant by his son; and that on its being afterwards shown to the defendant, he was asked if the son had authority to execute it for him, when he stated his son had authority, and that he adopted it. It was also shown that the defendant had subsequently confirmed the proceedings which had been taken by the plaintiffs as trustees under the deed: *Held*, that there was evidence of a delivery of the deed by the defendant, sufficient to sustain a verdict for the plaintiffs, notwithstanding the absence of proof of the son having been authorized to execute the deed by an instrument under seal.

This was an action to recover from the defendant his proportion of contribution payable to the plaintiffs by a deed of arrangement, by which certain creditors of one Richard Clements, of whom the defendant was one, agreed to indemnify the plaintiffs (who were trustees for such creditors) against damages and expenses they might incur in relation to the estate of the said R. Clements.

The defendant, having pleaded, *inter alia*, *non est factum*, it was, with reference to such plea, proved at the trial before KEATINGE, J., at the last Bristol Summer Assizes, that at a meeting of the creditors of the said R. Clements, held on the 21st of February, 1859, the deed of arrangement, containing the covenant on which the present action was brought, was assented to and executed by the creditors present, and that although the defendant did not attend this meeting himself, he was represented there by his son, John William Foulkes, who attended for him, and who signed the deed as follows: "John Wm. Foulkes, for Thomas Foulkes." Mr. Pinniger, solicitor for the trustees, gave evidence at the trial,

## No. 6. — Tupper v. Foulkes, 30 L. J. C. P. 214, 215.

that at a meeting of the creditors, held on the 25th of May, 1859, at which the defendant was present, he, the witness, showed the defendant the deed, and the execution by his son, and asked the defendant if his son had authority from him to sign the deed, and whether he adopted the signature; when the defendant said that his son had authority, and that he did adopt it. At this meeting of the creditors a report of the trustees was read, stating what they had done in execution of the trusts created by the deed, and the defendant joined in a resolution confirming such report. The defendant also attended subsequent meetings, at which he sanctioned the steps reported to have been taken by the trustees under the deed.

It was objected at the trial, by the counsel for the defendant, that evidence had not been given of any authority under seal to the defendant's son to execute the deed for him. The learned Judge held that the defendant's admission that his son had authority, was evidence that he had proper authority.

The jury having found a verdict for the plaintiffs, damages £195, a rule *nisi* was obtained, by Collier, for the defendant to set the verdict aside, and for a new trial, on the ground that the evidence proved the plea of *non est factum*. Against this rule —

M. Smith and Coleridge showed cause. The admission by the defendant that his son had his authority to sign the deed, and that he adopted his son's signature, was an admission that, whatever lawful authority might be necessary, that lawful authority the son had. If a power of attorney was necessary, the defendant admits there was a power of attorney.

[WILLIAMS, J. Does not a power of attorney require a stamp?]

That is no objection. It is every-day practice for a copy of a deed to be read in evidence. *Slutterie v. Pooley*, 6 M. & W. 664, 10 L. J. (N. S.) Ex. 8, goes the whole length of the present case. The written instrument there was inadmissible for want of a proper stamp; but the Court \* held, that a verbal [\* 215] admission by the defendant was evidence against him to prove its contents, and that rule is well established. *Doc d. The Birmingham Canal Company v. Bold*, 11 Q. B. 127.

[WILLIAMS, J. An admission that what the son did was by the defendant's authority is as consistent with its having been done without lawful authority, as with its having been done with lawful authority.]



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The defendant's admission goes to this extent: "I acknowledge this as my deed, and deliver it as such:" so that, in truth, the question as to what he meant by saying that his son acted by his authority becomes immaterial.

Collier, in support of the rule. The defendant was entitled to have the verdict found for him on the issue raised on the plea of *non est factum*. In *Taylor on Evidence*, 3rd edit. p. 811, s. 907, it is said: "In order to authorize an agent to execute a deed for his principal, the authority must be given by an instrument under seal. Neither can a parol ratification by the principal of a deed executed by his agent give validity to the deed when the agent has not been authorized to act by an instrument under seal; and it seems that evidence of the implied, if not of the express, recognition or adoption of the deed by the principal, will not, even as against him, raise a presumption that the agent was thus formally authorized to act, so as to dispense with the necessity of proving that fact." For this latter proposition is cited *Lord Gosford v. Robb*, 8 Ir. Law Rep. 217. The case of *Berkeley v. Hardy*, 5 B. & C. 355, 4 L. J. K. B. 184, shows that the agent authorized to execute a deed for his principal must be authorized to do so by an instrument under seal. Then there are cases, such as *Coll v. Dunning*, 4 East, 53, and *Whymman v. Gath*, 8 Ex. 803, 22 L. J. Ex. 316, which show that the admission by a party that he has executed a deed is not evidence to prove the execution of such deed.

[ERLE, C. J. That was where there had been an attesting witness. By having an attesting witness, the parties themselves had agreed that such should be the only mode of proving the execution.]

The case of *Slatterie v. Pooley*, cited on the other side, was the first deviation from the general rule; but without disputing its authority, it does not support the plaintiff's view. That case was commented on in *Lawless v. Queale*, 8 Ir. Law Rep. 382; and the Irish Judges considered that, notwithstanding *Slatterie v. Pooley*, the defendant's declaration of the terms of his holding was not admissible in an action of use and occupation, where it appeared in evidence that there was a written agreement as to such holding. In *Hunter v. Parker*, 7 M. & W. 343, PARKE, B. says: "Neither a parol ratification nor a parol authority could have the effect of giving power to the auctioneer to execute a deed for the plaintiff,

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or to make the bill of sale his deed." Here there is no admission by the defendant that he had executed any power of attorney authorizing his son to execute the deed: but it is consistent with what the defendant said, that he had authorized him only by parol.

[ERLE, C. J. Was not the acknowledgment of the deed by the defendant, when it was brought before him, evidence of a re-delivery?]

It is submitted that it was not.

[WILLIAMS, J. In *Hudson v. Revett*, 5 Bing. 368, 7 L. J. C. P. 145, a blank in a material part was left in a deed at the time it was executed, but was afterwards filled up in the presence of the party and with his assent, and, the deed having been recognized afterwards by such party, it was held that there was evidence of re-delivery. In that case HOLROYD, J., told the jury that if "there was that which amounted to a re-delivery, and showed that the party meant the deed should be acted on in its altered state, the alteration being made in his presence would amount to a re-delivery, and the deed would be his in its altered state;" and he said "that circumstances alone might be equivalent to a re-delivery." This case was recognized by the Court of Exchequer in *Hibblewhite v. M'Morine*, 6 M. & W. 200, 9 L. J. (N. S.) Ex. 217.]

\* It is submitted that what took place in the present [\*216] case cannot be considered as amounting to a re-delivery of the deed by the defendant, for there was no such intention on the defendant's part.

ERLE, C. J. I am of opinion that this rule should be discharged. Looking at the case of *Doe d. The Birmingham Canal Company v. Bold*, and the other cases which have been cited, I am of opinion that the admission of the defendant is evidence towards proving what he intended to admit. But whether the construction to be put on the words which passed be such as has been contended for by Mr. Collier, or by Mr. Smith, it is not necessary to determine, because whether this was executed as the deed of the defendant or not, I am of opinion that the evidence proved such acts of the defendant as showed a delivery of the deed by him as his deed; and, therefore, this rule ought to be discharged.

WILLIAMS, J. I also am of opinion that this rule must be dis-

charged. As to the first point, I agree that if the defendant had said, "I authorized my son, by deed, which I executed, to execute the deed," that would be evidence that he intended to admit that he had executed the deed by authority for that purpose given to his son; but whether the words used by the defendant meant that or not it is unnecessary to say, as there was evidence here of a second delivery of the deed. The deed was brought into the room at which the defendant was present, and the attorney states that he then asked the defendant if his son had authority to execute the deed for him, to which he replied that he had authority, and that he, the defendant, adopted it. That was followed by proof of the defendant having acted on it as a valid deed; and the question is, whether this, coupled with such acts, did not constitute a delivery of the deed. I think that it did. It is not necessary, in order to constitute a delivery, that the person should take the deed in his hands and say, "I deliver this as my deed;" but treating it as a valid deed is sufficient. As an authority for this, I refer to *Shep. Touch.* p. 58, 8th edit., where it is said, "So, if the deed be sealed and lying in a window or on a table, and I use these or the like words, 'There it is, take it as my deed,' this is a good delivery, and doth perfect the deed, for as the deed may be delivered by words, without deeds, so may it also be delivered by deeds, without words." Here, the deed being before the defendant, he says, "I recognize it as my deed." The cases of *Hudson v. Revett* and *Hibblewhite v. McMorine*, to which I have referred in the course of the argument, show that there was abundant evidence here for considering the deed as the deed of the defendant.

WILLES, J., concurred.

KEATING, J. There was evidence that the defendant's son had executed the deed for the defendant; whilst there was an admission by the defendant that he had given authority to his son to execute the deed; but whether the words used by the defendant would or not justify such inference being drawn from them as the jury drew, I am of opinion that there was evidence of a sufficient delivery of the deed by the defendant to sustain the verdict. The deed being present before him, the defendant acknowledges the execution of it, and adopts the act of his son; but the evidence does not stop there, for the defendant afterwards acted upon and recognized the proceedings which had been taken under the deed.

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That clearly amounted to a delivery. There is a case of *The King v. The Inhabitants of Longnor*, 4 B. & Ad. 647, 2 L. J. (N. S.) M. C. 62, in which it was necessary to prove the execution of an indenture of apprenticeship. The pauper and his father, who were both unable to write, had directed an attorney to sign for them, and the pauper had afterwards taken the indenture to the master, and had served under it; and it was held by the Court of King's Bench that there had been a sufficient delivery and execution of the deed to bind the father, because it might be inferred that he had given authority for that purpose to the attorney. The evidence in the present case appears to me to have been much stronger, and I agree with the rest of the Court in thinking that this rule should be discharged.

*Rule discharged.*

## ENGLISH NOTES.

An indenture was made between "A. for and on behalf of B. of the one part, and C. on the other part." A.'s authority to execute the deed on behalf of B. was contained in B.'s writing, which was not under seal. A. executed the deed in his own name. It was held that B. could not sue C. on the covenants in the deed, though they were expressed to be made by C. to and with B. *Berkeley v. Hardy* (1826), 5 B. & C. 355.

Appointments of agents of Corporations aggregate to do solemn or important acts on behalf of the body must be under seal. For instance, where a corporation appoints a syndic to receive administration: *In the Goods of Elizabeth Darke* (1859), 1 S. & T. 516, 29 L. J. P. 71, 2 L. T. 24, 8 W. R. 273; or an attorney to enter for condition broken or to deliver a lease, *Dumpro v. Sym*, Cro. Eliz. 816; or an agent of a municipal corporation to sell corporate estate, *Bowen v. Morris* (1810), 2 Taunt. 374, 387; or to take surrender of a lease, *Mayor of Oxford v. Crow* (C. A. 1893), 1893, 3 Ch. 535; 69 L. T. 228. See further as to deeds of corporations, Nos. 29 & 30 of "Contract," 6 R. C. 607 *et seq.*, Nos. 10, 11 & 12 of "Corporation," 7 R. C. 333 *et seq.*

## AMERICAN NOTES.

A power of attorney to execute a deed should be in writing and sealed. *Blood v. Goodrich*, 9 Wendell (New York), 68; 24 Am. Dec. 121, citing the *Steiglitz case*; *Gage v. Gage*, 30 New Hampshire, 420; *Vidau v. Griffin*, 21 California, 389; *Smith v. Perry*, 29 New Jersey Law, 74; *Drumright v. Philpot*, 16 Georgia, 424, 60 Am. Dec. 738; *Lawrence v. Taylor*, 5 Hill (New York), 113; *Jackson v. Murray*, 5 Monroe (Kentucky), 184; 17 Am. Dec. 53; *Clark v. Graham*, 6 Wheaton (U. S. Sup. Ct.), 577; *Rhode v. Louthain*, 8 Blackford (Indiana),



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443; *Gordon v. Bulkley*, 14 Sergeant & Rawle (Penn.), 331; *Shuetze v. Bailey*, 40 Missouri, 69; *Smith v. Dickinson*, 6 Humphreys (Tennessee), 261; 44 Am. Dec. 306; *Maus v. Worthing*, 3 Scammon (Illinois), 26; *Kine v. Brooks*, 9 Iredell Law (Nor. Car.), 218; *Spofford v. Hobbs*, 29 Maine, 148; 48 Am. Dec. 521; *Reed v. Van Ostrand*, 1 Wendell (New York), 424; 19 Am. Dec. 529; *Henry County v. Gates*, 26 Missouri, 315; *Humphreys v. Finch*, 97 North Carolina, 303; 2 Am. St. Rep. 293; *Elliott v. Stocks*, 67 Alabama, 336; *Adams v. Power*, 52 Mississippi, 828; *McNaughten v. Partridge*, 11 Ohio, 223. See other cases in the same courts cited in *Mechem on Agency*, sect. 93.

In *Clark v. Graham*, *supra*, the Court said that the argument "that a power to convey lands must possess the same requisites and observe the same solemnities as are necessary in a deed conveying the lands" "is apparently well founded," but "it is unnecessary to dwell" on it, "as another objection is fatal." "The general proposition is not controvertible that an agency to bind a principal by an instrument under seal (and this includes every essential part of it) must be created, and the authority conferred by a writing under seal." *Humphreys v. Finch*, *supra*.

"The verbal directions from Bussey to Lowder could confer no power upon the latter to make the conveyance in the name of the former; and they were equally impotent to increase the authority contained in the power of attorney. . . . A ratification cannot stand on higher ground than the original authority, and must be by an instrument under seal. Story on Agency, sects. 49, 242." *Spofford v. Hobbs*, *supra*.

"Public convenience requires that one man should have power to authorize another to execute a contract for him, as the business may frequently be as well performed by attorney as in person. But it is a general rule that such delegation of authority must be by deed, that it may appear that the attorney or substitute had a commission or power to represent the party; and further, that it may appear that the authority was well pursued. 1 Bac. Ab. 199; Co. Litt. 48 b. Great abuse might arise if one man, and particularly an insolvent debtor, should have it in his power to bind another *in his absence*, by so solemn an instrument as a deed, with a mere parol authority. No man can bind another by deed unless he has been authorized by deed to do it; and if a person, however authorized, if not by an instrument under seal, make and execute a deed, expressed to be in behalf of his principal, the principal is not bound by the deed, although he who made it is bound. *Banorjee v. Horey et al.*, 5 Mass. Rep. 11; *Hatch v. Smith*, 5 Mass. Rep. 52." *Gordon v. Bulkley*, *supra*.

"We have no doubt but that an authority by deed is necessary in order to bind the principal under seal. Paley on Agency; *Harrison v. Jackson*, 7. T R. 203." *Rhode v. Louthain*, *supra*.

"The settled law of this Court is, that to authorize the execution of a deed in the name of another, the authority must be by deed; no previous parol assent or subsequent adoption will bind the party, unless it be acknowledged and redelivered." *Smith v. Dickinson*, *supra*, citing *Turbeville v. Ryan*, 1 Humphreys, 113.

"An agent should not have the power to do an act where the instrument giving him the power is incomplete, — where it lacks a requisite which would

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be essential in performing the act itself. His authority should be co-extensive with the act to be done, and the instrument clothing him with the authority as complete as the deed which he is to give. It should be executed with the same formalities as are required in carrying out the will of the principal." *Gage v. Gage*, *supra*.

"The only exception to the rule that the authority to execute a deed must be by deed is where the agent or attorney affixes the seal of the principal in his presence, or by his direction." *Maus v. Worthing*, *supra*. A dissenting Judge said: "The rule as laid down seems to me to be destitute of any good reason on which to base it, and altogether too technical for this age. How a scrawl, made with pen and ink and affixed to the name of the writer of the letter, which is the authority to execute the appeal bond, could give it any additional validity, I cannot discover. It is conceded, if the writer's name had this magical scrawl affixed to it, it would then be sufficient, and it would then possess all the efficacy of a sealed instrument or deed. The general tenor of our laws has made great inroads upon many of those technical and refined notions which it was considered at one time heresy to question, and with the improvement made in other respects, it would seem to be time to release such proceedings from the dominion of a rule so arbitrary, so technical, so inapplicable to our condition, and so little calculated to promote justice. It was once the rule that a bond could only be discharged by something of as high a nature as the bond itself; yet who will now doubt that a parol receipt is good against such a bond? The ancient rule is also that if there be a subscribing witness to a bond or note, he must be called to prove its execution; proof of the admission of the party that he did execute it being inadmissible. Yet would this Court, if called upon, sanction a rule so absurd? You may hang a man on his own confession, but yet he shall not pay a debt of twenty dollars evidenced by his note of hand or bond, on the same kind of proof! I cannot consent to yield up my judgment, in any case, because others have decided a point in a particular manner, unless I can see the reason of the decision. Seeing none in this case, and believing that the purposes of justice are not at all subserved by an adherence to such antiquated rules and unmeaning technicalities, I dissent from the opinion. I think the letter of request ample authority to the party to sign the appeal bond. Several of my brother Judges coincide in the views here expressed, but think the rule is the law, with which they cannot interfere, it being for the legislative power to change it."

Mr. Mechem (Agency, sect. 93) observes: "But while this rule is firmly established, it is highly technical in its nature, and confessedly stands upon very narrow ground. The whole theory of the solemnity of a seal is wholly unsuited to the business methods of the present day, and the constant tendency of Courts and Legislatures is to ignore the distinction formerly founded upon its use."

So although it has been held that parol authority to fill blanks in deeds is insufficient (*Williams v. Crutcher*, 5 Howard (Mississippi), 71; 35 Am. Dec. 422; *Davenport v. Sleight*, 2 Devereux & Battle (Nor. Car.), 381; 31 Am. Dec. 420; *Burns v. Lynde*, 6 Allen (Mass.), 305; *Preston v. Hull*, 23 Grattan (Virginia), 600; 14 Am. Rep. 153; *Upton v. Archer*, 41 California, 85; 10 Am. Rep. 266),

yet there is a strong holding and tendency to the contrary. *State v. Young*, 23 Minnesota, 551; *Drury v. Foster*, 2 Wallace (U. S. Sup. Ct.), 24; *South Berwick v. Huntress*, 53 Maine, 89; 87 Am. Dec. 535; *Wiley v. Moor*, 17 Sergeant & Rawle (Penn.), 438; 17 Am. Dec. 696; *Com. Bank v. Kortright*, 22 Wendell (New York), 348; 34 Am. Dec. 317; *Humphreys v. Guilloe*, 13 New Hampshire, 385; 38 Am. Dec. 499.

An unauthorized deed by a partner may be subsequently ratified. *Gunter v. Williams*, 40 Alabama, 561; *Shirley v. Fearne*, 33 Mississippi, 653; 69 Am. Dec. 375; *Gibson v. Warden*, 14 Wallace (U. S. Sup. Ct.), 241; *Ely v. Hair*, 16 B. Monroe (Kentucky), 230; *Baldwin v. Richardson*, 33 Texas, 16; *Pike v. Bacon*, 21 Maine, 280; 38 Am. Dec. 259; *Haynes v. Seachrest*, 13 Iowa, 455.

The first principal case is cited by Devlin on Deeds, vol. 1, sect. 111, with the observation: "But the general American rule is that a parol ratification is sufficient to make such a deed the deed of the firm." Story cites the first principal case (Partnership, sect. 121), with the observation that "the more general doctrine" in America, "and indeed that which is mainly relied on, is a prior authority, or a subsequent ratification, not under seal, but either express or implied, verbal or written, is sufficient to establish the deed as the deed of the firm and binding upon it as such."

The leading and more recent American cases are practically unanimous in holding that an unauthorized execution of a deed of a partnership may be ratified by parol. *Holbrook v. Chamberlin*, 116 Massachusetts, 155; 17 Am. Rep. 146; *Bond v. Atkin*, 6 Watts & Sergeant, 165; 40 Am. Dec. 550; *Gunter v. Williams*, 40 Alabama, 561; *Haynes v. Seachrest*, 13 Iowa, 455; *Skinner v. Dayton*, 19 Johnson (New York), 513; 10 Am. Dec. 286; *Williams v. Gillies*, 75 New York, 197; *McDonald v. Eggleston*, 26 Vermont, 154; 60 Am. Dec. 303, disapproving *Steiglitz v. Egginton*; *Drumright v. Philpot*, 16 Georgia, 424; 60 Am. Dec. 738; *Wiley v. Lines*, 3 Houston (Delaware), 542; *Gibson v. Warden*, 14 Wallace (U. S. Sup. Ct.), 241; *Mann v. Etna Insurance Co.*, 40 Wisconsin, 549; *Purciance v. Sutherland*, 2 Ohio State, 478; *Gram v. Seton*, 1 Hall (New York), 262 (a very learned decision, greatly extolled by Story); *Frost v. Wolf*, 77 Texas, 455; 19 Am. St. Rep. 761; *Moor v. Boyd*, 15 U. C., C. P., 513; *Boonley v. Griston*, 9 U. C., Q. B., 455; *Howell v. McFarland*, 2 Ontario Appeals, 31; *Doe v. Tupper*, 4 Smedes & Marshall (Mississippi), 261.

Some cases go so far as to hold that the ratification need not be express, but may be inferred from the conduct and dealing of the firm. *Gwin v. Rooker*, 24 Missouri, 292; *Pike v. Bacon*, 21 Maine, 280; 38 Am. Dec. 259; *Davis v. Burton*, 3 Seamon (Illinois), 41; 36 Am. Dec. 511; *Kelley v. Pike*, 5 Cushing (Mass.), 484; *Hatch v. Crawford*, 2 Porter (Alabama), 54.

A few cases are cited as sympathizing with the early English doctrine. *Little v. Hazard*, 5 Harrington (Delaware), 291; *Cummins v. Cassidy*, 5 B. Monroe (Kentucky), 74; *Bentzen v. Ziecklein*, 4 Missouri, 417; *Tappan v. Redfield*, 5 New Jersey Equity, 339; *Fisher v. Pendec*, 7 Jones Law (Nor. Car.), 483; *Tucker v. Ryan*, 1 Humphreys (Tennessee), 113; *Snyder v. May*, 19 Pennsylvania State, 335, but none of these except the Delaware, Missouri, and Tennessee cases denies or considers the effect of a parol ratification. In the Tennessee case the Court said of the doctrine of parol ratification: "To as-

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sume this position in one sentence, and in the next to adopt the doctrine laid down by Lord KENYON in *Harrison v. Jackson*, 7 Term R. 207, seems to us contradictory and absurd: for if a previous assent or a subsequent parol adoption will do to bind the party, certainly there is no necessity for a written authority under seal to do it." But the Court yielded only to the force of previous decisions in that State, adding: "The doctrine is no favorite with us," and "certainly the alarm which Lord KENYON in *Harrison v. Jackson* supposed the mercantile world would feel, however justly it may have been apprehended in England, could not be felt here if it were determined that one partner might bind the other by a contract for the payment of money, though made under seal." And even in Delaware it is adjudged that the signing and sealing by one partner in the presence of the other, and with his assent, makes a valid execution for both. *Wiley v. Lines*, 3 Houston, 542.

Mr. Mechem (Agency, sects. 136-139) states the rule as follows: "It was the doctrine of the common law that the unauthorized deed of an agent could only be ratified by an instrument under seal. This rule has been greatly relaxed in partnership cases, and it is now quite universally held that the act of one partner, in executing in the name of the firm an instrument under seal, may be ratified by the other partner by parol. And in Massachusetts the Court has gone still further, and it is said that the law is settled in that Commonwealth that the unauthorized execution of a deed, in the name either of a partnership or an individual, may be ratified by parol." Citing *Holbrook v. Chamberlin*, *supra*.

The doctrine that parol ratification is invalid in the case of an unauthorized deed by a mere agent, not a partner, finds support in *Despatch Line v. Bellamy Manfy. Co.*, 12 New Hampshire, 205; 37 Am. Dec. 203, citing *Steiglitz v. Egginton*; *Spofford v. Hobbs*, 29 Maine, 148; 48 Am. Dec. 521; *Blood v. Goodrich*, 9 Wendell (New York), 68; 24 Am. Dec. 121, citing *Steiglitz v. Egginton*; *McDowell v. Simpson*, 3 Watts (Penn.), 129; 27 Am. Dec. 338; *McCracken v. San Francisco*, 16 California, 591. But a subsequent parol acknowledgment of an authority under seal is sufficient, *Blood v. Goodrich*, 12 Wendell (New York), 525, 27 Am. Dec. 152; and acts amounting to an estoppel *in pais* will confirm an unauthorized contract under seal. *Reese v. Medlock*, 27 Texas, 120; 84 Am. Dec. 611.

In *Drumright v. Philpot*, 16 Georgia, 424; 60 Am. Dec. 738 (holding that parol ratification in a partnership case is sufficient), the Court observe: "It is not my present purpose to controvert the old rigid doctrine of the common law, which asserts that no prior authority or subsequent ratification, either verbal or by writing, without seal, is sufficient to give validity to the instrument as the deed of the party. I yielded a reluctant assent to this threadbare technicality in *Ingram v. Little*, 14 Georgia, 173 (58 Am. Dec. 549). In *Texira v. Evans*, cited in *Master v. Miller*, 1 Anst. 228, Lord MANSFIELD repudiated the doctrine, and Chief Justice MARSHALL, in *Anderson v. Tompkins*, 1 Brock, 462, expressed himself dissatisfied with the extent to which it had been carried. In New York, Pennsylvania, and Alabama, the authority of *Texira v. Evans* is recognized and followed. *Woolley v. Constant*, 4 Johns. 51, 60 (4 Am. Dec. 246); *Ex parte Kerwin*, 8 Cow. 118; *Stahl v. Berger*, 10 Serg. & Rawle (Penn.)



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170; *Sigfried v. Leran*, 6 Id. 308 (9 Am. Dec. 427); *Wiley v. Moor*, 17 Id. 438 (17 Am. Dec. 696); *Ogle v. Graham*, 2 Penn. 132; *Boardman v. Gore*, 1 Stew. 517 (18 Am. Dec. 73). And from the reported cases, some of the other States, it would seem, begin to take the same view of the principle. *Hunt v. Adams*, 5 Mass. 358 (1 Am. Dec. 68); s. c. 6 Id. 519; *Warring v. Williams*, 8 Pick. 326; *Adams v. Frye*, 3 Met. 103; *Jenkins v. Jenkins' Heirs*, 2 Dana (Ky.) 102 (26 Am. Dec. 437); *Bank of Commonwealth v. McChord*, 4 Id. 191; *Johnson v. Bank of United States*, 2 B. Monroe, 310; *Camden Bank v. Hall*, 14 N. J. L. 583, 585; *Duncan v. Hodges*, 4 McCord. 239; *Whiting v. Daniel*, 1 Hen. & M. 391; *Jordan v. Neilson*, 2 Wash. (Va.) 164. And from some of the later cases, even in England, some relaxation of the rule seems to be indicated, even there. *Earl of Falmouth v. Roberts*, 9 Mee. & W. 471; *Davidson v. Cooper*, 11 Id. 778, 793. Having discharged my duty to the country by doing what I could in *Lowe v. Morris*, 13 Georgia, 147, to bring the modern scrawl misnamed a seal into merited contempt, I shall content myself with what I have now said to dismiss this branch of the case, and proceed to inquire, Is the subsequent implied verbal ratification of Drumright, the partnership *quoad* this transaction at least being established, sufficient to establish this sealed warranty as the deed of the firm, and binding upon it as such?

“I would remark that the whole reasoning on which this doctrine depends, as well as the authorities on which it is founded, is most ably and elaborately reviewed in the cases of *Cady v. Shepherd*, 11 Pick. 405, 406; 22 Am. Dec. 379, and *Gram v. Seton*, 1 Hall, 262. In the latter case, especially, all the English as well as the American authorities were examined at great length by Chief Justice JONES; and it is difficult to withhold one's assent to the conclusion at which he arrives.”

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(K. B. 1802.)

## RULE.

ONE who executes a deed for another under a power of attorney must execute it in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names.

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2 East, 142–145 (s. c. 6 R. R. 409).

*Deed. — Execution. — Power of Attorney.*

[142] One who executes a deed for another under a power of attorney, must execute it in the name of his principal; but if that be done it matters not

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in what form of words such execution is denoted by the signature of the names: as if opposite the seal be written “for *J. B.*” (the principal) “*M. W.*” (the attorney). (L. S.)

The defendant being indebted upon an account to the plaintiffs Wilks and Browne, who were formerly in partnership, as millers, it was agreed to refer the matter to arbitration; and accordingly bonds of submission were entered into by the parties as after-mentioned; and the arbitrators by their award dated 14th August, 1801, reciting that by two several bonds dated 15th June, 1801, under the respective hands and seals of *M. Wilks* and *J. Browne*, millers, and late partners, and of *W. Back*, the parties became mutually bound to abide the award, &c., proceeded to award the sum of £407 9s. 7*d.* to be due on the balance of accounts from the defendant to the plaintiffs, &c.

Upon a motion to set aside the award, the question was at last resolved into this, Whether Wilks had competent authority to bind Browne his late partner by executing the bond of submission for him. As to which it appeared that by an indenture dated 28th August, 1799, between Wilks and Browne, the latter for the considerations therein mentioned did constitute and appoint Wilks to be his attorney irrevocable to ask, demand, sue for, compound, and receive all the debts and effects of the said partnership: with full power for Wilks to sign, seal, and deliver in the name of Browne any deed, &c., whatsoever necessary for the purposes therein mentioned, &c. By virtue of this authority Wilks executed the bond of submission in question in this form: “*Matthias Wilks*,” (L. S.). “For *James Browne*, *Matthias Wilks*,” (L. S.), and it was sealed and delivered by Wilks for himself, and also for his \* late partner Browne; but the [\* 143] latter was not present at the time.

Garrow and Parnter, in showing cause against the rule, did not dispute that according to *Combe's case*, 9 Co. Rep. 76 b, where any has authority, as attorney, to do an act, he cannot do it in his own name, but in the name of him who gave the authority. But they contended that here the sealing and delivery was done by Wilks in the name of Browne as well as of himself, which he had authority to do by virtue of the power of attorney of August, 1799; and that the signing of his own name twice was not material, as he also signed the name of Browne, and declared that it was done

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for him. The form of words used cannot invalidate the act where the authority is sufficient to warrant the act done. If there had been only one seal, yet if the instrument were sealed and delivered for himself and his partner, he having authority so to do, it would have been sufficient, according to the case of *Ball v. Dunsterville*, 4 T. R. 313 (2 R. R. 394). It is true that was done in the presence of the other partner; but that was only material in that case, as showing that it was done by his particular authority: and here was a special authority by deed to do the act.

Erskine and Comyn, *contra*. It is clear from *Harrison v. Jackson*, 7 T. R. 207 (4 R. R. 422), that one partner cannot as such bind another by deed. Then if the authority be derived from the power of attorney Wilks ought to have executed it in the name of Browne the principal, and not in his own, according to what was said in *Combe's case*, and confirmed by Lord C. B.

GILBERT in 4 Bac. Abr. 140, and by Lord KENYON in [\* 144] *White \* v. Cayler*, 6 T. R. 177 (3 R. R. 147). So in *Frontin v. Small*, 2 Ld. Ray. 1418, s. c. 1 Stra. 705, a lease made by an attorney in her own name, though stated to be made "for and in the name of" the principal, was holden void, and that no action of covenant lay thereon. Now here it was signed by Wilks "for Browne;" whereas the signature ought to have been in the name of Browne, though made by Wilks. Therefore as Browne would not be bound by the award, it is void for want of mutuality.

GROSE, J. : —

No doubt the award must be mutual; and for this purpose the bond must be executed by Browne as well as by Wilks; but this is a sufficient execution by both. I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of his principal and not in his own name; but here it was so done: for where is the difference between signing J. B. by M. W., his attorney (which must be admitted to be good) and M. W. for J. B.; in either case the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done.

LAWRENCE, J. : —

No doubt, in point of law, the act done must be the act of the principal, and not of the attorney who is authorized to do it. The

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whole argument has turned upon an assumption of fact that this was the act of the attorney, which is not well founded. This is not like the case in Lord Raymond's Reports where the attorney had demised to the defendant in her own name, which she could not do; for no estate could pass from her, but only from her principal. But here the bond was executed by \*Wilks [\*145] for and in the name of his principal: and this is distinctly shown by the manner of making the signature. Not that even this was necessary to be shown; for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done. However he first signs his own name alone opposite to one seal to denote the sealing and delivery on his own account, and then opposite the other seal he denotes that the sealing and delivery was for James Browne. There is no particular form of words required to be used, provided the act be done in the name of the principal.

LE BLANC, J. :—

Wilks first signed it in his own name, as for himself, and then, to denote that the act was also done in the name of Browne, he signed it again for James Browne. I cannot see what difference it can make as to the order in which the names stand.

*Rule discharged.*

## ENGLISH NOTES.

In *Appleton v. Binks* (1804), 5 East, 148, 7 R. R. 672, the plaintiff declared in covenant upon articles of agreement between him of the one part and the defendant (for and on the part and behalf of A.) of the other part, with a *profert in curiam* of the article sealed with the seal of the defendant, whereby the plaintiff, in consideration of £6000 paid by A., covenanted with the defendant, his heirs and assigns, to convey some property to A.; and the defendant in consideration thereof covenanted for himself, his heirs, executors, &c., on the part and behalf of the said A., that A. should pay the £6000 on execution of the conveyance. It was held that the defendant was personally liable for the money.

In *Gardner v. Lachlan* (1836), 6 Sim. 407, 8 Sim. 123, A. employed the plaintiff to act as his agent in respect of some of his ships, and agreed that all advances to be made by the plaintiff for effecting insurances on his ships or otherwise should be secured by a mortgage of the ships and their freight. In March, 1832, Lachlan (the defendant), a shipbroker, on the behalf and by the authority of A., entered into a charter-party with the Commissioners of the Navy for the conveyance of emigrants to X. by A.'s ship M. The charter-party was



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made between two of the Commissioners of the Navy of the one part and Lachlan on behalf of the owners of the ship of the other part. Thereby Lachlan, on behalf of the owners, entered into certain covenants with the Commissioners, and in consideration of these covenants being performed by Lachlan on behalf of the owners, the Commissioners covenanted to pay the freight to Lachlan on behalf of the owners. The plaintiff insured the ship and paid the premiums, and retained the policies as security. A. then directed Lachlan to pay the freight moneys to the plaintiff. A part of the sum was paid, and A. by a mortgage assigned all the freight and earnings of the ship to the plaintiff, and Lachlan had notice of the assignment. The ship completed her voyage, and earned her freight. A. became bankrupt. Lachlan was one of the assignees in bankruptcy. It was held that the freight money was not in the order and disposition of A. The Vice-Chancellor said: "I think it is quite clear from the case of *Schack v. Anthony* (1 M. & S. 573) that A. could not recover from the Lords of the Admiralty, he being no party to it. I have always understood the settled rule of law to be that a party not named in the deed cannot recover by means of it, if it be a deed between parties. A deed poll may be so constructed as to give a person a right of action against the party who executed it; but where there is a deed between parties, I have always understood it to be a settled rule that no person can bring an action on it, except a party or those who claim through him."

So where the agent entered into an agreement for a tenancy "for and on behalf of A" and signed it in his own name, he was held to be personally liable. *Tanner v. Christian* (1855), 4 El. & Bl. 591.

A different intention, however, may appear from the terms of the whole document and signature taken together.

In *Juay v. Phosphate of Lime Company* (1868), L. R., 3 C. P. 139, 37 L. J. C. P. 73, 18 L. T. 541, 16 W. R. 309, a Spanish firm, C. & Co., authorized the plaintiff, a London merchant, by letter of attorney, to sign in the name of the firm a contract for the sale of their mines in Spain. The plaintiff was to be remunerated by part of the purchase-money. A memorandum or instrument of agreement was then made out between the plaintiff, "acting for himself, and under the letter of attorney for and on behalf of C. & Co., co-proprietors with him of the mines," of the one part, and the defendants, of the other part; and thereby the plaintiff, "acting for himself and his co-partners, who are hereinafter called the vendors," agreed to sell and the defendants to purchase the mines. This instrument was in duplicate. One part was sealed with the defendant's seal, and the other was signed by the plaintiff "for self and partners." It was decided that on the true construction of this document C. & Co. were parties to it, on the ground chiefly that

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C. & Co. were called the vendors, that the consideration moved from them, and that the plaintiff had signed "for self and partners." On the well-known principle, therefore, relating to the joinder of plaintiffs (see 1 R. C. 156 *et seq.*), the plaintiff, as one of joint covenantees, could not sue without joining his partners.

By a deed under seal, A. entered into a contract with P., the managing director of the company (who had power to act on behalf of the company, and had to give to the company the benefit of contracts made by him), under which, in consideration of certain assignments, P. covenanted to pay some money to A. No mention of the company was made in the deed, though A. knew that the contract was made for the company. The other directors had also taken part in the negotiations. On the winding up of the company, it was held that the debt could not be proved against it. *In re International Contract Company, Pickering's claim* (1871), L. R., 6 Ch. 525.

By articles of agreement under seal between J. A. & Co. and Y. & Co., Y. & Co. agreed to do certain works, for which J. A. & Co. agreed to pay some moneys, and J. S. by the same instrument guaranteed the payment of these moneys to Y. & Co. The attestation clause was "signed and delivered by the said J. A. & Co., in the presence of D." J. S., who held a power of attorney from J. A. & Co., signed thus: "P. P. A. — J. A. & Co. — J. S." Y. & Co. sued J. S. as guarantor. J. S. gave evidence to show that at the time of the execution he intended to sign on his own behalf as well as on behalf of J. A. & Co. A verdict was found for the plaintiff, and J. S. moved for a new trial on the ground that he had not signed the guarantee. It was held that the evidence produced by J. S. did not contradict the document, and that J. S. must be taken to have signed as a contracting party. *Young v. Schuler* (1883), 11 Q. B. D. 651, 49 L. T. 546.

## AMERICAN NOTES.

The doctrine that the execution by the agent must be in the name of his principal is abundantly recognized in this country. Mr. Mechem cites many cases to this point (Agency, sect. 421), including *Lutz v. Linthicum*, 8 Peters (U. S. Supr. Ct.), 165; *Briggs v. Partridge*, 64 New York, 357; 21 Am. Rep. 617; *Quigley v. De Haas*, 82 Pennsylvania State, 267; *Sargent v. Webster*, 13 Metcalf (Mass.), 497; 46 Am. Dec. 743; *Stinchfield v. Little*, 1 Greenleaf (Maine), 231; 10 Am. Dec. 65; *Elwell v. Shaw*, 16 Massachusetts, 42; 8 Am. Dec. 126; *Fowler v. Shearer*, 7 Massachusetts, 15; *Dayton v. Warne*, 43 New Jersey Law, 659; *Taft v. Brewster*, 9 Johnson (New York), 334; 6 Am. Dec. 280.

Mr. Mechem also cites the principal case as "a leading English case," to the doctrine that the form of the signing is not otherwise material if the intention to bind a principal is apparent. Also cited in 3 Reed on Statute of Frauds, sect. 1072.

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So where the agent was named in the instrument as the party ("E. L., president of the N. D. Co."), but the signing was in the name of the principal, this held the principal. *Northwestern Dist. Co. v. Brant*, 69 Illinois, 658; 18 Am. Rep. 631, citing the principal case. See *Shanks v. Lancaster*, 5 Grattan (Virginia), 110; 50 Am. Dec. 108; *Butterfield v. Beall*, 3 Indiana, 203.

So when a deed read, "West Kansas Land Company, by S. H., President, and T. S. C., Secretary, has granted," and was signed, "S. H., President; T. S. C., Sect'y.," and sealed, this was held the deed of the company. *City of Kansas v. Hannibal, &c. R. Co.*, 77 Missouri, 180.

In *Shanks v. Lancaster*, *supra*, the Court said: "It is a sufficient execution of a deed by an attorney in fact for his principal, if he signs the name of the principal with a seal annexed, stating it to be done by him as attorney for the principal; or if he signs his own name with a seal annexed, stating it to be for the principal."

In *Hale v. Woods*, 10 New Hampshire, 470; 34 Am. Dec. 176, the recital was, "D. K., as well for myself as attorney for Z. K.," and the signing was, "D. K.," and "D. K., attorney for Z. K." Held, valid, citing the principal case.

So where the agent gave, granted, and covenanted "for the company," and signed, "A. W. M., agent for the M. M. Co.," this was held the company's deed. *Magill v. Hinsdale*, 6 Connecticut, 464 a; 16 Am. Dec. 70, citing the principal case. And to the same effect, *McClure v. Herring*, 70 Missouri, 18; 35 Am. Rep. 404; *Shanks v. Lancaster*, 5 Grattan (Virginia), 110; 50 Am. Dec. 108; *Mussey v. Scott*, 7 Cushing (Mass.), 215; 54 Am. Dec. 719, citing the principal case as "never having been overruled and always regarded as rightly made," and also citing *Wilburn v. Larkin*, 3 Blackford (Indiana), 55; *Hunter's Ad'rs v. Miller's Ex'rs*, 6 B. Monroe (Kentucky), 612; and to the same effect, *McDaniels v. Flower B. M. Co.*, 22 Vermont, 274; *Bradstreet v. Baker*, 14 Rhode Island, 546; *Redmond v. Coffin*, 2 Devereux Equity (Nor. Car.), 437; *Inhabitants of Nobleboro v. Clark*, 68 Maine, 87; 28 Am. Rep. 22.

In *Briggs v. Partridge*, *supra*, a leading case, the Court said: "Can a contract under seal, made by an agent in his own name, for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. . . . A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligation is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a party not in any way appearing on its face to be a party to or interested in it, on proof, *dehors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it: and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule is declared by SHAW, C. J., in *Huntington v. Knor*, 7 Cush. 371: "Where a contract is made by deed, under seal, no one but a party to the deed is liable to be sued upon it, and therefore if made by an attorney or agent, it must be made in the name of the principal

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in order that he may be a party, because otherwise he is not bound by it." The same is held in *Scott v. McAlpin*, North Carolina Term Rep. 155; 7 Am. Dec. 703; *Elwell v. Shaw*, 16 Massachusetts, 42; 8 Am. Dec. 126; *Stinchfield v. Little*, 1 Greenleaf (Maine), 231; 10 Am. Dec. 65; *Locke v. Alexander*, 2 Hawks (Nor. Car.), 155; 11 Am. Dec. 750, all citing the principal case.

But where an agent signed a bond, not mentioning any obligor's name, "H. S. L. for C. C.," the agent was held personally liable. *Bryson v. Lucas*, 84 North Carolina, 680; 37 Am. Rep. 634, citing the principal case. And in *Townsend v. Hubbard*, 4 Hill (New York), 351, where the deed read "I. T." and others "by H. B., their attorney of the first part," and was signed "H. B. as attorney of the party of the first part," this was held the attorney's deed, and where a deed purported to be made by "S. S.," but was signed "S. H. S., attorney in fact of S. S.," this was held not the deed of S. S. *Morrison v. Bowman*, 29 California, 337.

Whether the agent's name should appear at all in the deed is a question somewhat vexed. See Mechem on Agency, sect. 427; Devlin on Deeds, sect. 379. That it must appear, and that the simple signing of the principal's name is not sufficient to bind him. *Wood v. Goodridge*, 6 Cushing (Mass.), 117; 52 Am. Dec. 771 (*dictum*); the Court observing: "There is a *dictum* of LAWRENCE, J., in the case of *Wilks v. Back*, 2 East, 142-145, which would seem to import that an agent might put his principal's name, without stating it to be by attorney. But it is but a *dictum*, the import of which is not entirely clear." The contrary was held, distinguishing the *Wood case*, in the case of an unsealed contract, in *Hunter v. Giddings*, 97 Massachusetts, 41; 93 Am. Dec. 54; and so in *Forsyth v. Day*, 41 Maine, 382, a case of a note, citing the principal case and disapproving *Wood v. Goodridge*; in *Devlinney v. Reynolds*, 1 Watts & Sergeant (Penn.), 328, but there the agent's name was in the body of the instrument, and it concluded: "In witness whereof the said M. H. by his attorney aforesaid," and was signed simply M. H.; and this is the doctrine of *Berkey v. Judd*, 22 Minnesota, 287; and this latter doctrine is preferred by the text-writers.

Mr. Mechem states the American rule accurately: "No set form of words is necessary. The deed must be in the name, and purport to be the act and deed, of the principal: but whether such is the purport of the instrument, must be determined from its general tenor, and not from any particular clause." In *Forsyth v. Day*, *supra*, it is said: "It is difficult to perceive any sound reason why, if one man may authorize another to act for him and bind him, he may not authorize him thus to act for and bind him in one name as well as another. As matter of convenience, in preserving testimony, it may be well that the names of all parties who are in any way connected with a written instrument, should appear upon the instruments themselves. But the fact that the name of the agent, by whom the signature of the principal is affixed to an instrument, appears upon the instrument itself, neither proves nor has any tendency to prove the authority of such agent. That must be established *aliunde*, whether his name appears as agent, or whether he simply places the name of his principal to the instrument to be executed."



SECTION II. — *Statutory Requirement that an Instrument should be by Deed.*

No. 8. — *PARKER v. TASWELL.*

(CH. 1858.)

No. 9. — *MARTIN v. SMITH.*

(EX. 1874.)

RULE.

WHERE an instrument is declared by statute (before the Judicature Acts) to be void at law unless made by deed, it may still operate in equity as a valid agreement; and the agreement in equity may constitute a good consideration for an implied promise upon which an action at law may be maintained.

**Parker v. Taswell.**

27 L. J. Ch. 812–815 (s. c. 2 De G. & J. 559).

*Deed. — Agreement for Lease.*

[812] An agreement for letting a farm for ten years, though void at law, under the 8 & 9 Vict. c. 106, as a lease, was held to be valid as an agreement, and specific performance of it was decreed.

The insertion of “&c.” in some of the terms of the agreement did not produce such uncertainty as to render the agreement incapable of specific performance, where the property, the rent, and the other material points in the lease, were sufficiently described and ascertained.

This was a suit for the specific performance of an agreement to demise to the plaintiff, and for an injunction to restrain an action of ejectment commenced by the defendant Taswell.

In and previously to December, 1855, the plaintiff was tenant to the defendant Taswell of two farms, called “Wether Hill” and “Moory,” under a holding, which would expire at May-day, 1856; and on the 24th of December, 1855, an agreement was entered into, which was (so far as necessary to state) as follows:—

“Conditions of letting Wether Hill and Moory Farms. — An agreement made between John Wood, agent for and on behalf of

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George Morris Taswell, of the one part, and Robert Parker the younger and Robert Parker the elder, of the other part. The said J. Wood agrees to let and the said R. Parker the younger and R. Parker the elder agree to take, for a term of ten years, commencing at May-day, 1856, the farms \* above mentioned, [\* 813] and now in their occupation. . . . The leading of all materials required for buildings proposed to be built, or that may hereafter be built, or for the repair of buildings to be done at the expense of the tenant. . . . Gates, buildings, &c., to be left in repair by the tenant, the landlord finding new gates when required. . . . The landlord reserves to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, &c., allowing the tenant for any reasonable damage that may accrue.”

This agreement was signed by R. Parker, jun., R. Parker, sen., and John Wood, as agent for and on behalf of G. Morris Taswell, Esq. The elder Parker was a party to the agreement as a surety only.

The buildings referred to in the agreement were, as alleged by the bill, certain buildings which Taswell had, through his agent, previously stipulated to erect on the farms, and a dispute arose as to the plaintiff being entitled to obtain stone for the buildings from quarries within the farms, the defendant Taswell's agent requiring that he should “lead” the stone from Dun House Quarry, which was situated three miles and a half from the farms.

In January, 1857, the defendant commenced an action of ejectment, for the recovery of the farms, and the plaintiff being advised that, under the agreement of December, 1855, he had no defence to the action, instituted this suit for specific performance of the agreement, and to restrain the action.

On the 14th of January Vice-Chancellor STUART made a decree for specific performance, without costs on either side; and his Honour, in consequence of some evidence as to the understanding between the parties, directed that the lease should contain a covenant by the tenant to pay the tithe commutation rent-charge.

From this decree the plaintiff appealed as to the direction that he should pay the rent-charge, and as to his costs; and the defendant appealed as to the specific performance.

Mr. Malins and Mr. Prendergast, for the plaintiff. — The first question was whether this was a valid agreement, the specific per-

formance of which could be enforced. That depended, in the first instance, upon the 8 & 9 Vict. c. 106, which enacted that a lease required by law to be in writing of any lands or tenements, made after the 1st of October, 1854, should be void at law unless made by deed. The terms, however, of this agreement showed that it was intended to be executory; the commencement of it was "Conditions of letting." *Fenner v. Hepburn*, 2 Y. & C. C. C. 159, was conclusive that a Court of equity would enforce such an agreement. Then had the plaintiff committed any breach of his agreement so as to disable him from having specific performance? *Dowell v. Dew*, 1 Y. & C. C. C. 345; 12 L. J. (N. S.) Ch. 158. Such breaches, if alleged, must be material. *Gregory v. Wilson*, 9 Hare, 683; 22 L. J. Ch. 259. As to the alleged uncertainty of the agreement and part performance they cited *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; 9 L. J. (N. S.) Ch. 95. As to the tenants paying the tithe rent-charge they referred to 6 & 7 Will. IV. c. 71, s. 80. *Powell v. Lovegrove*, 2 Jur. N. S. 791; *Pain v. Coombes*, 1 De Gex & J. 34.

Mr. Dart (with whom was Mr. Bacon), for the defendant. — The Statute of Frauds required an agreement to be in writing, or if by parol, evidence in writing to substantiate it. *Leroux v. Brown*, 16 Jur. 1021; 22 L. J. C. P. 1. The statute did not invalidate a parol agreement, but it was a mere question of evidence. This explained many of the cases. *Gregory v. Mighell*, 18 Ves. 328 (11 R. R. 207). Here no parol agreement was alleged, but the plaintiff put his case entirely on the written agreement. The 8 & 9 Vict. c. 106 had made this document void as a lease, it not being by deed, and it could not be enforced as an agreement. *Strutton v. Pettit*, 16 C. B. 420; 24 L. J. C. P. 182. The uncer-

tainty also of several of the terms of the agreement, and [\* 814] particularly as to the \* "&c." introduced into some of them rendered it incapable of specific performance. *Price v. Griffith*, 1 De Gex, M. & G. 80; 21 L. J. Ch. 78; *Williamson v. Wootton*, 3 Drew. 210; *Vansittart v. Vansittart*, 4 Kay & J. 62; 27 L. J. Ch. 222, 289; *Taylor v. Portington*, 7 De Gex, M. & G. 328; *Stapylton v. Scott*, 13 Ves. 425, 427; 16 Ves. 272 (10 R. R. 179); *Manser v. Back*, 6 Hare, 443.

Mr. Wigglesworth, for another defendant.

Mr. Malins, in reply.

The LORD CHANCELLOR (LORD CHELMSFORD). — [After stating the

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circumstances of the case and the object of the two appeals] — said, that it would be the better course, in the first instance, to consider the plaintiff's right to demand specific performance. The first objection was founded on the nature of the agreement, and it was said that as the agreement contained words of present demise, it was void by the 3rd section of the 8 & 9 Vict. c. 106; and it was insisted, on the part of the defendant, that, if it were void as a lease, it was not good as an agreement. Certainly, in no sense, even if it were under seal, could it be considered a lease, it not having been executed by the landlord himself; and therefore the landlord could not be bound by its covenants. But, assuming that it had been signed by the landlord, and contained words of present demise, and was void at law as a lease, under the 3rd section, was it void for every other purpose? *Stratton v. Pittit*, which was so much relied upon by the defendant, was merely an authority that when the language used by the parties shows that the meaning of the instrument was, that it should operate as a lease, a present demise, it should be void as a lease at law. The Court did not there consider whether the instrument was good as an agreement or not. The language of the 3rd section was very cautious. A lease required by law to be in writing was to be "void at law," unless made by deed. If the Legislature had intended that the instrument should not be available for any purpose, it would have said that it should be void both at law and in equity, or to all intents and purposes. This was precisely the case in which equity ought to carry into effect the obvious intention of the parties. As to the objection which went upon the uncertainty of the subject-matter, — the difficulty of arriving at the meaning of the parties as to the building materials, repairs, the customary rights reserved to the landlord, &c., there appeared to be no difficulty in construing the agreement with sufficient certainty. There had, moreover, been a part performance, in favour of which this Court would strain its jurisdiction. The agreement, in reference to the buildings, was not that the tenant himself would do the work, but the whole effect of it was to throw the expense of the buildings on the tenant, by whomsoever done; and if the work was not done by the tenant, the landlord might do it at the tenant's expense. The "&c.," where it occurred in the agreement, was of easy interpretation; the "gates, buildings, &c.," which were to be kept in repair by the tenant included all those things



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the repair of which, according to the custom of the country, were thrown upon the tenant; and the “&c.” of the customary rights and reservations, reserved to the landlord, were such as liberty to cut and plant timber, and so on. There was no uncertainty in the subject to which all these stipulations referred, — the farms were described; neither was there any question as to the rent, which was ascertained; nor as to the term, which was defined; on these material points the agreement was definite. As to the plaintiff's appeal against that part of the VICE-CHANCELLOR's decree which directed that the lease should contain a covenant for payment by the tenant of the tithe commutation rent-charge, it was admitted that the agreement, as it now stood, would not entitle the landlord to claim any part of such rent-charge. The 80th section of the Tithe Commutation Act (6 & 7 Will. IV. c. 71) enacted that any tenant who should occupy any lands by any lease or agreement made subsequently to the commutation, and who should pay such rent-charge, should be entitled to deduct the amount thereof from the rent payable to his landlord. If nothing had been

said on the subject of the tithe rent-charge between [≈ 815] \* landlord and tenant, the latter paid it and deducted it from his rent. It was said by the defendant Taswell, however, that, in this case, there was an understanding that the tenant should pay it; but there was nothing in the evidence to show that this subject ever entered into the contemplation of the parties prior to, or at the time of the agreement. In all cases of mistake there must be clear evidence that the parties were under a mistake, and there was no such evidence here. The best course, in cases like the present, was to stand on the agreement. That part of the VICE-CHANCELLOR's decree, therefore, which directed the insertion of a covenant for the payment by the plaintiff of the rent-charge, would be altered, and the VICE-CHANCELLOR ought to have given the plaintiff costs.

### **Martin v. Smith.**

L. R., 9 Ex. 50-53 (s. c. 43 L. J. Ex. 42; 30 L. T. 268; 22 W. R. 336).

[50] *Landlord and Tenant. — Occupation under void Demise. — Terms applicable to a yearly Tenancy.*

By an agreement not under seal, the plaintiff agreed to let to the defendant, and the defendant to take of the plaintiff, a house and premises for seven years, upon the terms (amongst others) that the defendant would, in the last year of the

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term, paint, grain, and varnish the interior, and also whitewash and colour. The defendant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, &c., the interior, and whitewashing and colouring in the seventh year:—

*Held*, that the defendant must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year: and that he was therefore liable.

Declaration, that by an agreement of the 15th of February, 1866, the plaintiff agreed to let to the defendant, and the defendant agreed to take from the plaintiff, a dwelling-house and premises upon the following terms (amongst others), viz.: Term, seven years from Lady Day, 1866; rent £50, payable quarterly; tenant to pay all rates and taxes (except property-tax); also to maintain the said house and premises in repair, together with all drains, &c., and leave them in repair at the end of the term; also to paint two coats and grain, and twice varnish the interior, in the last year of the term, with the best materials and workmanship, also whitewash and colour; that the defendant, pursuant to the said agreement, entered into and upon the said house and premises, and held and occupied the same as tenant from year to year thereof, subject to the aforesaid terms, or such of them as were applicable to the said tenancy, during the whole term or period of seven years aforesaid, which expired before action, viz., on March 25, 1873; and all conditions, &c.: yet the defendant did not, during the said tenancy, maintain the said house and premises in repair, together with all drains, &c., nor did the defendant leave them in repair at the end of the said tenancy; and, secondly, the defendant did not paint two coats and grain and twice varnish the said interior in the last year of the tenancy, with best materials and workmanship, nor did the defendant whitewash and colour as aforesaid.

Demurrer to the second breach and joinder.

\* English *Harrison*, in support of the demurrer. — The [\* 51] agreement is in words of present demise, and being for a longer term than three years, is void under 8 & 9 Vict. c. 106, s. 3: and the only obligation on the defendant was such as arose out of the tenancy from year to year which was created by his occupying and paying rent, applying to that tenancy such of the terms of the agreement as were applicable to a yearly tenancy. But this

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term is not so applicable, for it is not to be performed in each year of the tenancy, but only in the seventh year of a term which the parties intended to create, but which was in fact never created. On this ground *Beale v. Sanders*, 3 Bing. N. C. 850, may be distinguished.

E. Clarke, *contra*. The agreement, though void as a lease, was a good agreement, and might be enforced in equity. *Parker v. Taswell*, 2 De G. & J. 559, 27 L. J. Ch. 812, p. 642, *ante*, and its terms were adopted by the conduct of the parties, and applied to the tenancy which was in fact created, so far as they were not inconsistent with it. A term may be so inconsistent with a yearly tenancy as to be inapplicable; as, for instance, a term requiring a two years' notice to be given, *Tooker v. Smith*, 1 H. & N. 732; but there is no such inconsistency in the parties agreeing that, if the relation of landlord and tenant shall continue for the whole period contemplated, the tenant or the landlord will do certain acts or pay a sum of money. *Tress v. Savage*, 4 El. & Bl. 36, 23 L. J. Q. B. 339; *Digby v. Atkinson*, 4 Camp. 275 (16 R. R. 792); *Pistor v. Cater*, 9 M. & W. 315. The word "term" is not to be interpreted in a strict sense, but signifies the period of seven years during which the tenancy was to last. *Bowes v. Croll*, 6 El. & Bl. 255.

E. Harrison, in reply.

KELLY, C. B. I am of opinion that the plaintiff is entitled to judgment. An agreement has been entered into between the plaintiff and the defendant, with words of present demise, for a tenancy of certain premises for a term of seven years; the rent was to be payable and certain acts were to be done in each year, and in the last year of the term the tenant was to do certain [\* 52] \* painting and colouring beyond the annual repairs. The agreement being void at law as a lease under 8 & 9 Vict. c. 106, s. 3, but the tenant having entered into possession and having occupied and enjoyed the premises during the whole period, the question is, what are the liabilities of the tenant under the agreement coupled with this occupation and enjoyment. It is now clearly settled that when a tenant enters under an agreement for a term which is void at law, he is liable as a tenant from year to year, on all the terms of the agreement applicable to a yearly tenancy. It may be suggested, indeed, that, the agreement being void at law, there was no consideration for such a promise as the plain-

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tiff contends for; but *Parker v. Taswell*, 2 De G. & J. 559, 27 L. J. Ch. 812, p. 642, *ante*, has decided that such an agreement, though void as a lease, is good and valid as an agreement, and may be enforced in equity by a decree for specific performance. This agreement, then, being capable of being enforced, there was a good consideration for the promises of the parties. The question, then, is whether the term of the agreement that the tenant should paint during the last year of the term of seven years is applicable to a tenancy from year to year which has, in fact, continued during the whole of that period; and it appears to me that, although during that period the defendant was only tenant from year to year, and his tenancy might at any time have been determined by a half year's notice to quit, yet his occupying under the agreement amounted to a promise that, if he should continue to occupy for the entire term he would perform what was by the agreement to be performed in the last year of that period. In *Tress v. Savage*, 4 El. & Bl. 36, 36 L. J. Q. B. 339, where there was an agreement in words of present demise, dated the 17th of December, for a tenancy to commence on the 25th of December, and the question was, whether the tenant was entitled to a half year's notice to quit at the end of the three years, the effect of the occupation under the agreement was held to be that the tenant "has not a lease nor a tenancy for three years and a week, but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then by the agreement of both parties he goes without notice." I think \* that case is not distinguishable in principle from [\* 53] the present, and our judgment must therefore be for the plaintiff.

PICOTT, B. I am of the same opinion. The agreement contemplated a term of years, and *Parker v. Taswell*, 2 De G. & J. 559, 27 L. J. Ch. 812, p. 642, *ante*, decides that such an agreement is void only as a lease, but that it is valid and may be acted on and enforced as an agreement. Therefore the defendant was not merely tenant from year to year during his occupation, but he had a right at any time to enforce specific performance of the agreement, and turn it into a lease. There is, therefore, nothing to prevent us from giving effect to the intention of the parties, by holding that the stipulation as to painting in the last year of the period of seven years, if he should remain tenant so long,



was one of the terms under which the defendant occupied those premises.

CLEASBY, B. I am of the same opinion. Although the word "term" is used in the agreement, we are not bound to construe it in its technical sense, but as meaning space or period of time, as was done in *Bovcs v. Croll*, 6 El. & Bl. 255 at p. 265, where CROMPTON, J., says: "It is argued that they (defendants) must occupy for a 'term' of five years, and that this means a term created by a lease. I think that is a narrow construction. We have the authority of the Court of Common Pleas, in *Wood v. Copper Miners Co.*, 14 C. B. 428 at p. 467; 17 C. B. 561; 23 L. J. C. P. 209; 24 L. J. C. P. 34, that in a similar case the words 'term of twelve years' and 'term aforesaid' do not mean the term to be created by the lease in the technical sense of the expression, but that the true meaning of the word 'term' there is 'period' or 'space of time.'" Those words are entirely applicable to the present case, and in deciding for the plaintiff we are giving effect to the obvious intention of the parties.

*Judgment for the plaintiff.*

#### ENGLISH NOTES.

Before the Judicature Acts, a tenant in possession under a void lease who paid rent was at law a tenant from year to year, holding upon such terms of the agreement as were not inconsistent with a yearly tenancy. For instance, in *Lee v. Smith* (1854), 9 Ex. 662, 23 L. J. Ex. 198, he was obliged to pay his rent in advance, as stipulated in the invalid lease. The same rule applied as to leases granted on behalf of a corporation, but not under seal. *Doc d. Pennington v. Tanicre* (1848), 12 Q. B. 998, 18 L. J. Q. B. 49, 13 Jur. 119; *Ecclesiastical Commissioners of England v. Merrill* (1869), L. R., 4 Ex. 162, 38 L. J. Ex. 93, 20 L. T. 573, 17 W. R. 676.

The yearly tenancy thus created had one peculiarity. It was a yearly tenancy during the continuance of the term proposed to be granted by the invalid lease, and terminable by notice in the usual way; but at the expiration of that term it terminated without any notice to quit. *Doc d. Tilt v. Stratton* (1828), 4 Bing. 446, 1 M. & P. 183, 3 C. & P. 164; *Berrey v. Lindley* (1841), 3 M. & Gr. 498, 4 Scott, N. R. 61, 5 Jur. 1061. This was so, even though the lease stipulated for the extension of the term under certain conditions. *Doc d. Devenish v. Moffatt* (1850), 15 Q. B. 257, 19 L. J. Q. B. 438, 14 Jur. 935.

As *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, 52 L. J. Ch. 2, shows,

Nos. 8, 9. — *Parker v. Taswell* ; *Martin v. Smith*. — Notes.

the Judicature Acts have considerably modified the effect of this rule. A tenant in occupation under a void lease or agreement for lease is bound by all the terms of the agreement. The MASTER OF THE ROLLS (Sir G. JESSEL), in delivering the judgment, said: "There is an agreement for a lease under which possession has been given. Now, since the Judicature Acts, the possession is held under the agreement. There are not two estates, as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted."

## AMERICAN NOTES.

*Parker v. Taswell* is cited in Pomeroy's Equity Jurisprudence, sect. 860; and in Wood on Landlord and Tenant, sect. 179; and in Wood on Statute of Frauds, sect. 728; and in Reed on Statute of Frauds, sects. 807, 819; and in Taylor on Landlord and Tenant, sect. 32.

A tenancy from year to year is implied where one enters into possession under a parol or other lease void by the Statute of Frauds, and the rights of the parties may be ascertained by reference to the lease. *Barlow v. Wainwright*, 22 Vermont, 88; 52 Am. Dec. 79; *Thurber v. Dieger*, 10 Rhode Island, 355; *Shepherd v. Cummings*, 1 Coldwell (Tennessee), 354; *Lounsbery v. Snyder*, 31 New York, 514; *Gretton v. Smith*, 33 New York, 245. In *Reeder v. Sayre*, 70 New York, 180, the Court said of an oral lease for two years: "So that the whole agreement was void, and might have been legally repudiated, as soon as it was made, by either party to it. But occupation of the lands was taken with the consent of the owner, and the rent was paid to him, in pursuance of and under the void agreement. In such case the occupation inures as a tenancy from year to year." Citing *Clayton v. Blakey*, 8 T. R. 3; *Thunder v. Belcher*, 3 East, 449. "The agreement, though by parol, and void as to the term and the interest in lands sought to be created, regulates the relations of the parties to, it in other respects upon which the tenancy exists, and may be resorted to to determine their rights and duties, in all things consistent with and not inapplicable to a yearly tenancy, such as the amount of rent to be paid, the time of year when the tenant could be compelled by the landord to quit, and any covenants adopted to a letting for a year." Citing *Doe v. Bell*, 8 T. R. 579; *Arden v. Sullivan*, 14 Ad. & Ell. (N. S.) 832.

Mr. Reed says "the status of a tenant, entering under a void lease or holding over after the expiration of a valid one, has been considered" in the principal case, and in *Strong v. Crosby*, 21 Connecticut, 398; *Currier v. Barker*, 2 Gray (Mass.), 224; *Roberts v. Tennell*, 3 T. B. Monroe (Kentucky), 251; *Stoops v.*

*Derlin*, 16 Missouri, 162; *Friedhoff v. Smith*, 13 Nebraska, 5; *Drake v. Newton*, 23 New Jersey Law, 111; *Hey v. McGrath*, 81 \* Pennsylvania State, 310; *Phillips v. Robertson*, 4 Haywood (Tenn.), 158. Add *Grant v. Ramsey*, 7 Ohio State, 165; *Jones v. Peterman*, 3 Sergeant & Rawle (Penn.), 543, citing *Earl of Aylesford's case*; *Brewing v. Berryman*, 2 Pugs. (N. B.) 115; *Doe d. Parkinson v. Hauptman*, Bert. (N. B.), 645; *Koplitz v. Gustavus*, 48 Wisconsin, 48; *Williams v. Ackerman*, 8 Oregon, 405; *Chicago A. Co. v. Davis Machine Co.*, 142 Illinois, 171, *Nash v. Berkmeir*, 83 Indiana, 536; *Evans v. Winona Lumber Co.*, 30 Minnesota, 515.

In a note to 2 Woodfall on Landlord and Tenant, p. \*219, Mr. Webster, the American editor, says: "At common law and in all the American States and Provinces except Maine and Massachusetts, parol leases for terms of years create after entry implied tenancies from year to year." In the two excepted States they create tenancies at will. Mr. Webster gives a valuable account of the cases in the different States. Mr. Washburn (1 Real Property, \*391) says that in case of the lessee's taking possession under an oral lease: "If the lease does not exceed three years from the time of *making*, it is, by the English Statute, 29 Car. II. c. 3, §§ 1, 2, as valid and binding as if no such statute had been enacted. The rule is the same in Georgia, Indiana, Maryland, North Carolina, Pennsylvania, New Jersey, and South Carolina. This term in Florida is two, and in the following States one year, namely: Alabama, Arkansas, California, Connecticut, Delaware, Iowa, Kentucky, Michigan, Mississippi, New York, Nevada, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin. In Maine, Massachusetts, Missouri, New Hampshire, Ohio, and Vermont all such leases create tenancies at will only. Although parol leases are, in the cases before enumerated, declared by these statutes mere estates at will, or in some cases void, yet if the lessee enters and occupies and pays rent under them, he becomes a tenant from year to year, in those States where such tenancies are recognized, or a tenant at will in others, with the rights as to notice of such tenants." Citing Browne on Statute of Frauds, sect. 38 *et seq.*, *Adams v. McKesson's Ex'rs*, 53 Pennsylvania State, 83; *Birckhead v. Cummins*, 33 New Jersey Law, 41; *Morrill v. Mackman*, 24 Michigan, 286; *Lobdell v. Hall*, 3 Nevada, 517.

In 8 Am. & Eng. Enc. of Law, p. 666, it is said: "The effect of a parol demise for a term greater than the statutory limit is to create merely an estate at will in most of the United States" (citing Arkansas, Georgia, Maine, Massachusetts, New Hampshire, New Jersey, Missouri, South Carolina, and Vermont), "or an estate from year to year in some of the States" (citing New York, Michigan, Pennsylvania, Kentucky, Wisconsin), "and in England" (citing Clayton v. Blakeley, 8 T. R. 3), "or for the statutory period for which an oral lease is good" (citing Nebraska), "or where possession is taken and rent paid and accepted."

Here are three different classifications of the holdings in the States, and it would answer no useful purposes in this note to attempt to correct or reconcile them.

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No. 10. — *Ex parte Melbourn; In re Melbourn*, L. R., 6 Ch. 64. — Rule.

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### SECTION III. — *Registration.*

No. 10. — *EX PARTE MELBOURN; In re MELBOURN.*

(CH. 1870.)

#### RULE.

WHERE by the law of the country where a deed is made registration is required, not as a condition of the validity of the deed, but for the purpose of the deed conferring a priority over creditors not parties to it, the deed will receive effect in the Courts of another country without regard to the consequences of non-registration by the law of the place where made.

#### *Ex parte Melbourn; In re Melbourn.*

L. R., 6 Ch. 64-70 (s. c. 40 L. J. Bk. 25; 23 L. T. 578; 19 W. R. 83).

#### *Deed. — Registration affecting Remedy on Deed but not Validity.*

M. and his wife, who were married in Batavia, entered into a contract [64] before the marriage, by which a sum of 75,000 guilders was settled on the wife for her separate use. By the law of Batavia no marriage contract excluding a community of goods has any effect as regards third parties until registered in the Courts of that country. The contract in question was never registered.

M. and his wife subsequently came to England, where M. became bankrupt, and his wife claimed to prove against his estate for the sum settled: —

*Held*, that the provision of the law of Batavia respecting registration did not affect the validity of the contract, but only the remedy of those claiming under it: that all questions of priority of creditors must be determined by the law of the country where the bankruptcy takes place; and therefore that M.'s wife was not precluded by the non-registration of the deed from proving for the sum settled *pari passu* with the other creditors.

This was an appeal from an order of the Registrar, Mr. Spring Rice, sitting as Chief Judge in the London Court of Bankruptcy, expunging and disallowing the proof of Anna Eliza Melbourn, the wife of the bankrupt, George Melbourn, for £6250.

The bankrupt was married to Anna Tolson, both being British subjects, on the 2nd of January, 1860, at Batavia, in the Dutch colony of Java, where they were then domiciled.



Previously to the marriage, on the 18th of December, 1859, they executed a marriage contract of that date, which was made according to the Dutch Indian law, and contained, among other things, the following stipulations:—

“ Art. 1. Between the future consorts there shall not exist any communion of property or goods, nor of profit and loss, nor of benefits nor income.

“ Art. 2. All and every the goods or moneys and effects which they respectively may have, either as their own free property or which they may have the usufruct of, or which they hold in trust at the time when the marriage is contracted, or which they may inherit, or which may be left them by legacy, or otherwise, shall remain the separate property of each of the contracting [\* 65] parties \* respectively, while, on the other hand, the person or property of the one shall not be liable or answerable for any debts or liabilities contracted or incurred by the other, either previous or subsequent to the marriage.

“ Art. 3. The husband shall have the control and the management of all the property and effects of his wife.

“ Art. 4. The goods of the female applicant consist of: 1st. Her clothes and appurtenances. 2nd. Her private jewels, trinkets, &c. 3rd. A sum of 75,000 guilders, which the husband gives to the wife for life, but of which the control remains with the husband, while the gift is made on condition that in case of the unhopèd-for previous decease of the wife, the money given shall return to the possession of the husband.”

This settlement was duly executed by the parties, and was attested by a notary; but was not registered, as required by the law of the Dutch East Indian colonies.

Mr. and Mrs. Melbourn subsequently returned to England, where they remained until the 24th of March, 1869, when Mr. Melbourn was adjudicated bankrupt.

Mrs. Melbourn claimed to prove against his estate for the sum of £6250, being the equivalent of 75,000 guilders, secured to her by the settlement. The Registrar disallowed the proof, and from this decision Mrs. Melbourn appealed.

After the notice of appeal had been given, Mr. Melbourn, the bankrupt, died.

The following opinion of M. Auguste Philips, an advocate in the Court of Amsterdam, with respect to the Batavian law

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No. 10. — Ex parte Melbourn; In re Melbourn. L. R. 6 Ch. 65, 66.

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applicable to the settlement, was given in evidence by the assignees:—

“ The matrimonial law in Dutch India, with respect to property, is essentially as follows. —

“ By marriage all the property belonging to the husband and to the wife is made common between them. All the goods of both parties are brought into community at marriage. This community includes all property real and personal, present and subsequently acquired, and is liable for the debts of both parties. By the sole operation of the law, marriage creates a *communio omnium bonorum*.

\* “ But the parties may, before their marriage, enter into [\* 66] nuptial contracts, which contracts must be made by notarial deeds, and cannot be altered after marriage. By such contracts the community of goods, which would otherwise take place, may be modified or even wholly excluded.

“ It is, however, provided by Art. 152 of the Code of Dutch Indian Civil Law, in force since the 1st of March, 1848, that no stipulations in marriage contracts modifying or excluding the legal community of goods shall have any effect with regard to third parties but from the day on which such stipulations shall have been registered at the office of the Clerk of the Court of Justice under whose jurisdiction the marriage was contracted. The register, in which a copy of such stipulation is entered, is a special register open for inspection to the public.

“ Marriage contracts made in foreign countries are, in the same way, subject to registration.

“ If a merchant, who married at Batavia after the 1st of March, 1848, become a bankrupt, his wife cannot avail herself of any marriage contract nor claim any property as her separate property, and she cannot be admitted as a creditor unless the marriage contract, by virtue of which such claim might have been made, has been registered in the Court of Justice.

“ I scarcely need to add that, if no registration of the marriage contract has been effected at the time of the marriage, a registration at a later period could only operate for the future, but would have no retroactive effect.”

Mr. Winslow, and Mr. Westlake, for the appellant:—

The Registrar rejected the proof on the ground that the settlement, not having been registered in the Court of Batavia, had no

effect as against the creditors. But the non-registration does not affect the validity of the contract, but only the remedy of the persons claiming under it. The question whether the document constitutes a contract, and what the interpretation of that contract is, must be determined by the *lex loci contractus*, but all questions of remedy depend upon the *lex fori*. *De la Vega v. Vianno*, 1 B. & Ad. 284.

In the present case there can be no doubt that there was [\* 67] a \* contract between the parties on which an obligation arose, although, as against third parties, the remedy was barred in the Dutch Courts. But that will not prevent one of the contracting parties pursuing her remedy in a Court which is not bound by the Dutch law, as in cases turning on the Statute of Limitations.

This is, in truth, simply a question of priority between the creditors of the bankrupt, and that question must be decided according to the law of the Court where the *concurso* of creditors takes place. This has been often decided in cases of administration, and the same rule will apply in the distribution of assets under a bankruptcy. *Preston v. Viscount Melville*, 8 Cl. & F. 1, 2 R. C. 78; *Cook v. Gregson*, 2 Drew. 286; *Pardo v. Bingham*, L. R., 6 Eq. 485; Story's Conflict of Laws, Sects. 323, 325 (f), 325 (i); Savigny's Conflict of Laws, Guthrie's Translation, p. 210.

With respect to the amount of the proof, we contend that Mrs. Melbourn had not a life interest only, but that, on the death of her husband, the fund was given to her absolutely. She is, therefore, entitled to prove for the whole sum.

Mr. De Gex, Q. C., and Mr. Bagley, for the assignee:—

We do not deny that, in the administration of assets in bankruptcy, the English law is to govern the priority of creditors. But that is subject to the rule that the creditors must show that there is a debt existing according to the law of the country where the contract is stated to have been made. Here there was no contract. The contract was made contingent on the registration of the deed, and that has not been done. The formal requisites of a contract, according to the *lex loci contractus*, are necessary for its validity everywhere, as in the case of instruments void for want of a stamp. *Bristow v. Sequerville*, 5 Ex. 275; *Alces v. Hodgson*, 7 T. R. 241, 2 Esp. 528 (4 R. R. 433); Westlake's Private International Law, Sect. 173.

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We also contend that Mrs. Melbourn's interest was only for her life, and that it was not given to her for her separate use, but remained at her husband's disposal during their joint lives. *Spiro v. Willows*, 3 D. J. & S. 293.

\* Mr. Winslow was heard in reply as to the extent of [\* 68] the interest taken by Mrs. Melbourn.

Sir W. M. JAMES, L. J., said that it would be more satisfactory if the opinion of a Dutch advocate were obtained on the construction of the document, namely, whether, assuming the document to be duly registered, and the husband to be dead, the wife is entitled under the contract, according to the Dutch Indian law, only to a user of the 75,000 guilders during her life, or to the absolute interest, or what other interest she has. The case might then be mentioned again to this Court.

The Court then gave judgment on the rest of the case.

Sir G. MELLISH, L. J. :—

This is an appeal asking that an order made by Mr. Registrar Spring Rice, expunging or disallowing the proof of Anna Eliza Melbourn, may be rescinded, and that the proof may be admitted for the full sum of £6250, or such lesser sum as this Court shall think fit to allow. Now, the question is, whether this lady is entitled to prove at all for this debt under these circumstances: She was married to the bankrupt in Batavia, and previously to her marriage there was a marriage contract, which is admitted to have been made before a notary, and to have been in itself, at any rate as between the parties, valid according to the law there. By that it was agreed that between the future consorts there should not exist "any communion of property or goods, nor of profit and loss, nor of benefits or income." Then by Article 4, on which this question turns, it was agreed that the goods of the wife should consist, among other things, of a sum of 75,000 guilders, "which the husband gives to the wife for life, but of which the control remains with the husband, while the gift is made on condition that in case of the un hoped-for previous decease of the wife, the money given shall return to the possession of the husband."

Now, the question is, whether the husband, having become bankrupt, the wife can prove for the amount to which she is entitled, be it the life interest or be it the entire interest in the sum. It has been contended that she cannot, because it is said that by the law of Batavia the marriage contract ought to have



[\* 69] been registered, \* and that the fact of its not having been registered prevents her separate proof. We, of course, must take the law of Batavia from the only evidence which is before us — the opinion of the advocate who has been consulted, and who makes an affidavit as to what the law in Batavia is. [His Lordship read the opinion of M. Auguste Philips, and continued:] It is clear from this statement of the Dutch law that the contract, having been made by a notarial deed, is in itself perfectly binding; and the next question, therefore, is, what is the effect of the 152nd article of the Dutch Indian Civil Code with respect to the registration of the deed? Now, I do not think there is any dispute as to the general principle of law which should govern this case. It is fairly laid down in the case of *De la Vega v. Vianna*. In the construction of a contract the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law here. The real question is, does this Article 152 prevent there being a contract at all, or modify the proper construction of the contract; or is it a mere provision with reference to the remedy on the contract? A great many other authorities and opinions of foreign jurists have been cited, but they are all really to the same effect.

Now, there seems no doubt at all that in the case of bankruptcy the question of priority of the different creditors *inter se* must be governed by the law of the country where the bankruptcy takes place, and where the assets of the debtor are being administered. The question then is, does this affect the contract itself? Mr. De Gex contends that the effect of it is this, that although there is a contract between the husband and wife, there is none as respects third parties. I have great difficulty in understanding that argument. It is admitted that, as between husband and wife, there is a debt and a binding contract. Then what is the meaning of saying it shall not be binding as between third parties, or it shall not affect third parties? Surely it only means that in an administration of the assets of the husband in bankruptcy this claim is to be postponed to the claim of all other parties.

No doubt, if a bankruptcy had taken place in Batavia, inasmuch as the law with respect to the registration of the deed had  
 [\* 70] \* not been complied with, any claims the wife might have against her husband would be postponed to the claims of

No. 10. — *Ex parte Melbourn*; *In re Melbourn*, L. R., 6 Ch. 70. — Notes.

all third parties; but there is no such law here. I am of opinion that it is simply a question of priority of creditors *inter se*, and does not prevent the wife from proving as a creditor of her husband in respect of this sum, which is in effect settled to her separate use; and that, as by the law of this country all creditors who have a right to prove are entitled to prove *pari passu* with the other creditors, she is in the same position, and is entitled to prove in the same manner.

Sir W. M. JAMES, L. J., concurred.

## ENGLISH NOTES.

Messrs. Scheibler & Co., who were German merchants, carried on business in London and Shanghai. One of the firm being in Prussia, entered into verbal negotiations with Holthausen & Co., Prussian merchants, for opening a credit account with them, against which Scheibler & Co. were to draw bills to a certain amount. By way of security, they proposed to deposit with Holthausen & Co. the title deeds of lands in Shanghai. The agreement was finally concluded by a letter written by Scheibler & Co. from London, transferring the title deeds to Holthausen & Co., and undertaking to register the mortgage at Shanghai as required by the law of that place. Scheibler & Co. liquidated their affairs by arrangement in the London Bankruptcy Court. The mortgage had not been registered in Shanghai, and without such registration was incomplete according to the Colonial Law. Holthausen & Co. applied for an order that the trustee in liquidation should convey the lands to them. It was decided that, in spite of the absence of registration, the contract was binding on Scheibler & Co. so as to create an equity binding on the trustee; and the lands were ordered to be sold for the benefit of Holthausen & Co. *Ex parte Holthausen, In re Scheibler* (1874), L. R., 9 Ch. 722, 44 L. J. Bk. 26.

A ship was built for a foreign owner, and was not intended to be registered as a British ship. The builder assigned the ship to a creditor by an instrument which was not registered as required by English law. As the ship was not British, it was held that non-registration did not invalidate the assignment. *Union Bank of London v. Lenanton* (1878), 3 C. P. D. 243, 47 L. J. C. P. 409, 38 L. T. 698.

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No. 11. — Taylor v. Sparrow, 4 Giffard, 703. — Rule.

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SECTION IV. — *Title Deeds.*

No. 11. — TAYLOR v. SPARROW.

(CH. 1863.)

No. 12. — STANFORD v. ROBERTS.

(CH. APP. 1871.)

No. 13. — LEATHES v. LEATHES.

(CH. D. 1877.)

RULE.

THE right to the custody of title deeds follows the estate. A tenant for life (legal or equitable) is entitled to the deeds, but in the case of an equitable tenant for life upon undertaking for their custody and production. The only exception being

- (a) Where the tenant for life has endangered the safety of the deeds.
- (b) Where possession of the deeds is required in order duly to administer the property to which they refer.

**Taylor v. Sparrow.**

4 Giffard, 703-706.

*Title Deeds — Custody — Tenant for Life.*

[703] Devise of residuary real estate to trustees, upon trust to permit testator's sisters, if single, to receive the rents for life without power of anticipation, but if either should marry or die, then the single one or survivor to take the whole; but if both married, on trust to sell and divide the proceeds among testator's nephews and nieces. The title deeds having passed into the possession of the surviving tenant for life: On a bill filed by the trustees, the Court refused to direct the tenant for life to deliver up the deeds to the trustees.

George Taylor, of Birmingham, by his will dated March, 1857, gave and devised unto his two nephews, Jesse and George Taylor, their heirs, executors, administrators, and assigns, all the resi-

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No. 11. — *Taylor v. Sparrow*, 4 Giffard, 703, 704.

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duary, real, and personal estate upon trust to permit his sisters Sophia and Matilda Sparrow to receive and take all the rents, interest, dividends, and annual proceeds thereof for and during the term of their natural lives, to and for their own use and benefit, and their respective receipts alone should be the only good and effectual discharge for the same; and the same should be received by the said Sophia Sparrow and Matilda Sparrow, notwithstanding any assignment or disposition by either of them made; and in case either of them, the said Sophia and Matilda Sparrow, should depart this life or marry, then the one surviving and remaining unmarried should be entitled to \*receive the [\* 704] whole of the income arising from testator's said estate and effects, as the same should become due and payable; but in case both of them should marry, then testator directed his trustees to stand possessed of his estate and effects, upon trust to sell the same, and to pay and distribute the money to arise from the sale in the manner therein mentioned, as if they had both departed this life. And from and after the decease of them, or both of them marrying, then testator directed his trustees to stand possessed of the trust-funds upon trust to pay and divide the same amongst the nephews and nieces equally.

And the testator empowered his trustees to stand possessed of the share of any nephew or niece dying before the distribution of his estate, upon trust to invest the same and apply the proceeds for the benefit of the children by the first marriage of such nephew or niece; and he also empowered his trustees, or his said sisters-in-law, Sophia Sparrow and Matilda Sparrow alone, to pay to any ground landlord any sum of money which should be awarded, or which should be payable from his estate by reason of the expiration of any lease during the life or lives of his sisters-in-law, or which might be recoverable by any breach or default in the fulfilment of any of the covenants in any lease under which he held any of his properties; and the testator also empowered his said sisters-in-law to renew any lease of any part of his estate for a term of years, with power to take down such buildings as might be erected thereon, and erect others more suitable and convenient, as they should be advised.

And he charged his estate with a sum of money not exceeding £400 for the above purposes, and authorised the trustees to take leases in their own names, and to hold them upon the trusts of



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the will. He appointed his said sisters-in-law executrices of his will. One of the sisters-in-law, Sophia Sparrow, died in the lifetime of the testator; and, by a codicil to his will dated [\* 705] the 7th of February, 1861, he appointed \* Matilda Sparrow, the survivor of the two sisters-in-law, the sole executrix of his will. He died in October, 1861, and at the date of his death, was entitled to freehold property at Birmingham, consisting of several houses, and the defendant, Matilda Sparrow, upon the decease of the testator, possessed herself of the several title deeds relating to the testator's freehold and leasehold properties. The plaintiffs, as devisees in trust, applied to the defendant to hand over these deeds to them. This she refused to do. The trustees then instructed their solicitor to make a formal demand for the deeds, which he did in January, 1863, and the defendant having still refused to deliver them up, on the following 5th of March, this bill was filed against the tenant for life, Matilda Sparrow and Jacob Townshend Taylor, as one of the residuary legatees in remainder, praying amongst other things, for the proper administration of the trusts of the will, and "that all proper directions might be given respecting the custody of the title-deeds and securities relating to or forming part of the testator's estate."

Mr. Bacon and Mr. Renshaw contended that either as trustees or remainder, the plaintiffs were entitled to the custody of the deeds. The custody of a tenant for life who did not represent the inheritance was irregular and improper. As trustees the plaintiffs could not discharge the duties cast upon them without possession of the deeds. They cited *Langdale v. Briggs*, 8 De G. M. & G. 391, 416; *Warren v. Rudall*, John. & H. 1.

Mr. Malins and Mr. C. Hall, for the tenant for life, submitted that she had the legacies, and was entitled to the custody of the deeds.

[\* 706] \* Mr. O. Morgan, for a defendant, referred to *Lee v. Prieau*, 3 Bro. C. C. 381.

The VICE-CHANCELLOR (SIR JOHN STUART):—

It is not the rule of the Court to take the deeds from the tenant for life into whose hands they have passed, nor is it usual to demand security for such deeds where it is not alleged that they were endangered by remaining in the custody of the tenant for life. The case of *Lady Langdale v. Briggs* has no application to this case, because the facts are totally different.

No. 12. — *Stanford v. Roberts*, L. R., 6 Ch. 307.

Mr. Lewin, in his Book on Trusts, 3rd ed. 592; 5th ed. 482, c. 23-26, appears to approve of a rule in early times acted on that whoever first received the deeds is at liberty to retain them. The rule is referred to in *Foster v. Crabb*, 12 C. B. 136-379, 21 L. J. C. P. 189, p. 672, *post*, where the rule is recognised; but that is quite intelligible, because at law it could not be argued that possession is wrongful where the holder has an interest in the property, and in such a case a court of law would not change the custody of the deeds. Neither will this Court interfere with the possession of the deeds by the tenant for life where there is no suggestion that they are endangered by remaining in such custody. The case of *Warren v. Rudall*, 1 John. & H. 1, the rule here referred to, appears to be one of technical application. It is observable, also, that there is no decision in that as to any such rule. There is no ground in my opinion for changing the custody of the deeds here.

**Stanford v. Roberts.**

L. R., 6 Ch. 307-310 (s. c. 19 W. R. 552).

*Title Deeds. — Custody. — Tenant for Life.*

A testator devised his real estate in strict settlement, giving to trustees [307] a power of sale and exchange, to be exercised with the consent of the person entitled in possession, if of full age; and he bequeathed his residuary personalty to the trustees upon the trusts declared concerning the moneys to arise from sales under the power. Shortly after the death of the testator a decree was made at the suit of the first tenant for life, then an infant, for the execution of the trusts of the will. Parts of the estate were sold under the power and the money paid into Court, and a large fund was there, applicable to the purchase of real estates. After the tenant for life came of age inquiries were directed as to the investment of part of the funds in real estate, and as to the propriety of applying to Parliament for a private estate Act, which inquiries were still being prosecuted. Shortly after this the tenant for life applied to the Court, that the trustees might be ordered to deliver to her the title-deeds of the estates, subject to the limitations of the will, which application was refused by STUART, V. C. : —

*Held* by the Lords Justices of Appeals, that, as a suit affecting the estates was being prosecuted, the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit: and that the Court of Appeal would not interfere with the discretion of the Vice-Chancellor on the subject.

This was a motion by way of appeal from a decision of Vice-Chancellor STUART, who had refused to order delivery to the appel-

lants of the title-deeds of the real estate of the testator in the cause.

The testator, W. Stanford, by will dated the 10th of December, 1852, appointed Roberts, Tanner, and E. Stanford, executors and trustees, and gave to his wife a yearly rent-charge of [ 308 ] £1000 for her \* life. He then devised all his real estate to Smith and Williams for the term of 1000 years upon the trusts thereafter mentioned, and subject thereto to the use of his sons and their children in strict settlement, with remainder to the use of his daughter, the plaintiff, for life, without impeachment of waste, with remainder to her first and other sons successively in tail male, with divers remainders over. The trusts of the term of 1000 years were declared to be to secure the rent-charge of £1000, to provide for the repairs of his mansion-house during his wife's occupation of it, and to provide portions for the testator's younger children. The testator gave to Roberts, Tanner, and Stanford, and the survivors, &c., power to receive the rents during the minority of any unmarried person entitled in possession, with the usual directions as to allowing maintenance out of them, accumulating the surplus, and investing it in real estate. Powers of leasing were given to tenants for life in possession when of full age, and to the trustees during minorities. Powers of sale and exchange and partition were given to the trustees, to be exercised with the consent of the person for the time being entitled in possession if of full age, the usual directions being given for the investment of the proceeds of sale in real estates, to be settled to like uses. The testator's wife was to be entitled to reside rent free in his mansion-house until some child of his became entitled to the occupation of it. The testator bequeathed the clear residue of his personal estate to the trustees upon the trusts declared concerning moneys to arise from the power of sale.

The testator died in April, 1853, leaving no issue but the plaintiff, who was an infant, and shortly after the testator's death this suit was instituted in her name by a next friend; and on the 1st of July, 1854, a decree was made for carrying the trusts of the will into execution: and it was, among other things, ordered that E. Stanford should receive the rents and profits of the testator's real estate and pay the balances into the bank to the credit of the cause. Various sales took place of parts of the testator's real estate under the power of sale with the sanction of the Court, and the proceeds

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No. 12. — *Stanford v. Roberts*, L. R., 6 Ch. 308, 309.

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were paid into Court; and by an order made on further consideration on the 14th of July, 1855, so much of the funds in Court as had arisen from capital was carried to "the capital account," and so much as had arisen from income was carried to \* "the accumulated income account," directions being [\* 309] given as to the maintenance of the plaintiff.

Roberts having died, Gordon was appointed trustee in his room.

In 1867, the plaintiff, then a minor, intermarried with Mr. Bennett, and with the sanction of the Court in the cause, and under the Act 18 & 19 Vict. c. 43, for enabling infants to make settlements, a settlement was executed by which her life estate in the testator's real estate was vested in trustees.

Upon coming of age, the plaintiff changed her next friend and carried on the suit.

After this, in July, 1870, an inquiry was directed on the petition of the plaintiff, whether the purchase of certain farms was a proper purchase wherein to invest £9250, to be raised out of £27,378 consols then standing to the capital account. Another order was made directing part of the funds standing to the capital account to be carried over to an indemnity account, to secure purchasers against a rent-charge. By a third order, an inquiry was directed as to the propriety of applying to Parliament for a private estate Act. The first and third of these orders were still being prosecuted.

On the 28th of November, 1870, the plaintiff and the trustees of her settlement, who had been let into possession of the estates, took out a summons to obtain delivery to them by Stanford and Gordon (Tanner having lately died), of the title-deeds of the estates subject to the limitations of the will, which deeds had ever since the testator's death been in the custody of the trustees of the will. This summons, having been adjourned into Court, was dismissed by Vice-Chancellor STUART. The plaintiff and the trustees of her settlement appealed.

Mr. Waller, for the appellants:—

The legal tenant for life is entitled to the custody of the title-deeds. *Allwood v. Heywood*, 11 W. R. 291; *Garner v. Hannington*, 22 Beav. 627; *Sugden's Vend. & Pur.*, 11th ed. p. 468; *Davis v. Earl of Dysart*, 20 Beav. 405. In *Straker v. Hamilton*, (before Vice-Chancellor STUART, on the 19th of November, 1869), His Honour made such an order as we ask for in almost precisely similar circumstances.



[\*310] \* [The Lord Justice JAMES: Must the deeds be delivered to a tenant for life where there are trustees with active duties to perform?] A trustee, no doubt, may be entitled to them where he has active duties to perform, though he has not such an estate as would *per se* entitle him to them, as *e. g.*, a termor, *Garner v. Hunnington*; but here the trustees of the will have no estate in the land, and the mere fact of a power being vested in them, a power which cannot be exercised without our consent, cannot give them any right to the deeds.

The Lord Justice JAMES asked what was the objection to giving up the deeds.

Mr. Cecil Russell, for the respondents, replied that the trustees of the settlement resided in different places, and that to place the deeds in their possession would be inconvenient.

Sir W. M. JAMES, L. J. :—

This case does not appear to me to turn on the mere question of legal title. There is a pending suit which relates to these estates, and which is being actively prosecuted. The only question then is, where, having regard to the purposes of this suit, the deeds can be most conveniently kept. The VICE-CHANCELLOR has, in the exercise of his judicial discretion, held that it is most convenient to allow them to remain where they are, and with that discretion we shall not interfere.

Sir G. MELLISH, L. J., concurred.

### **Leathes v. Leathes.**

46 L. J. Ch. 562-564 (s. c. 5 Ch. D. 221; 36 L. T. 646; 25 W. R. 492).

#### *Title Deeds. — Custody. — Tenant for Life.*

[562] The Court will not interfere with the right of a legal tenant for life in possession to the custody of the title deeds unless there is danger to the safety of the deeds, or unless the Court is carrying into effect the trusts of the property and the deeds are required for that purpose.

This was a motion by the plaintiff, who was legal tenant for life in remainder, under his father's will, of a freehold estate, for leave to deposit in Court the title deeds, and that they might be retained in Court until the trial of the action, and then be secured for the benefit of the persons interested in the estate.

## No. 13. — Leathes v. Leathes, 46 L. J. Ch. 562, 563.

The title deeds in question had come into possession of the plaintiff during the lifetime of his father, whose solicitor he had been.

The defendant, who was the legal tenant \*for life in [\* 563] possession of the estate, claimed to be entitled to the custody of the deeds, but the plaintiff resisted the claim, on the ground that the defendant had long resided in Australia, and might make an improper use of the deeds by showing them to parties who were claimants of a part of the estate.

Mr. Ince and Mr. Chester, in support of the motion, cited *Stanford v. Roberts*, L. R., 6 Ch. 307 (p. 663, *ante*); *Jenner v. Morris*, 3 De Gex, F. & J. 45, L. R., 1 Ch. 603; *Warren v. Rudall*, 1 Jo. & H. 1, 29 L. J. Ch. 543.

Mr. Chitty and Mr. Langworthy, *contra*. — The legal tenant for life is entitled to the custody of the deeds. *Garner v. Hannington*, 22 Beav. 627.

There are *dicta* that every remainder-man has a right to have the deeds brought into Court, *Reeves v. Reeves*, 9 Moo. 132; *Pyncent v. Pyncent*, 3 Atk. 571; *Smith v. Cooke*, 3 Atk. 382; but nevertheless there is not a single decision that way, but the rule is settled the other. Sugden, Vendors and Purchasers, 14 ed. p. 446 n.

THE MASTER OF THE ROLLS (Sir G. JESSEL). — A legal tenant for life in possession of freeholds is entitled as of right to the custody of the title deeds except in cases where he has been guilty of misconduct, so that the safety of the deeds has been endangered, or where the rights of others intervene, and it becomes necessary for the Court to take charge of the deeds in order to carry into effect the administration of the property.

In *Garner v. Hannington (ubi supra)*, Lord ROMILLY held that the legal tenant for life is *primâ facie* entitled to the custody of the title deeds. The question came before the Court of Exchequer in *Allwood v. Heywood*, 1 Hurl. & C. 745, 32 L. J. Ex. 153, when the full Court held that it was but reasonable that the plaintiff, who was legal tenant for life, should have the custody of the title deeds.

There are many *dicta* to the same effect, including a passage in Sugden's Vendors and Purchasers (*ubi supra*).

The only case the other way is that of *Warren v. Rudall (ubi supra)*. There the deeds were in Court, and WOOD, V. C., stated the rule thus: "With respect to the title deeds, it is a settled

doctrine, that this Court never interferes as to the possession of deeds between a father tenant for life and a son entitled in remainder, but in the case of a stranger tenant for life the Court will interfere." There is a *dictum* of Lord HARDWICKE in *Pygient v. Pygient (ubi supra)* to the same effect, but it is quite contrary to law, for the mere fact of the reversioner being a stranger to the tenant for life has nothing to do with the question.

Now I come to the other branch of this case, namely, to consider under what circumstances this Court will interfere. First, the Court will interfere where there is any danger to the safety of the deeds, if left in the custody of the tenant for life. Secondly, where the Court is carrying into effect the trusts of the property, and the deeds are wanted for that purpose. Beyond this the Court does not go. In the case of *Stanford v. Roberts (ubi supra)* there was a pending suit affecting the estate. The LORDS JUSTICES thought that there was an actual duty to be performed by the trustees, and Lord Justice JAMES observed, "This case does not appear to me to turn on the mere question of legal title. There is a pending suit which relates to these estates, and which is being actively prosecuted. The only question then is, where, having regard to the purposes of the suit, the deeds can be most conveniently kept. The VICE-CHANCELLOR has, in the exercise of his judicial discretion, held that it is most convenient to allow them to remain where they are, and with that discretion we shall not interfere."

The other case was that of *Jenner v. Morris (ubi supra)*. That was rather a peculiar case. A suit had been instituted for raising portions out of a settled estate. Pending the suit the [\*564] tenant for \* life took a number of the leases to Paris, and afterwards, under an order of the Court, brought all the title deeds and leases into Court for the purposes of the suit. After these purposes had been satisfied, and the portions raised, he applied to have the title deeds and leases given up to him. His application was opposed by the mortgagees, and was refused by Vice-Chancellor KINDERSLEY. On the appeal, KNIGHT BRUCE, L. J., said: "I cannot, without the consent of the mortgagees, concur in an order for delivery of these documents to a tenant for life, who on a former occasion has, without any necessity, taken a number of them out of the jurisdiction." It would seem, then, that the sole ground of that decision was the fact of the tenant for life having taken some of the deeds out of the jurisdiction, there

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being danger, in the opinion of the LORD JUSTICE, if they remained in his custody. The Lord Justice TURNER, however, did not altogether agree, but by consent an order was made for delivering of the deeds to the tenant for life, who was required to give security for their safe custody, and for their production at reasonable times, and return into Court if ordered.

In the present case it has been suggested, as a reason why I should assent to the motion, that the tenant for life has for many years resided in Australia. That is no reason at all.

The second suggestion is, that there is some conflict as to the ownership of a portion of the estate, and that the tenant for life might show the deeds to the adverse claimant. There is, however, no ground shown for that suspicion.

Thirdly, it is said that the tenant for life has cut down some timber on the estate, but that, if proved, does not show that he is an improper person to have the custody of the deeds. The motion must be refused.

#### ENGLISH NOTES.

Under 5 Geo. II. c. 30, a commission in bankruptcy was issued against a person entitled in remainder to some real property, and an assignee was appointed. No bargain and sale of the reversionary estate was made by the commissioners. In 1844, after death of the assignee, the estate vested in the bankrupt in possession, and he, afterwards and prior to the Bankruptcy Act 1849, conveyed it to the defendants. In 1853, the bankrupt died without obtaining his discharge. No assignee had been re-appointed since the estate vested in the bankrupt's possession, until 1859, when the plaintiffs were appointed assignees. They, having recovered the property in ejectment, were held entitled to have the title deeds. *Plant v. Cotterell* (1860), 5 H. & N. 430, 29 L. J. Ex. 198.

In *Goodman v. Boycott* (1862), 2 B. & S. 1, 31 L. J. Q. B. 69, the devisee of an estate was held entitled to recover the title deeds from a person with whom the testator had deposited them. In *Easton v. London* (1864), 33 L. J. Ex. 34, the life tenant granted a lease under his powers in a will. The life tenant and the lessee obtained an advance from A. on the security of the title deeds and the assignment of the lease. The life tenant died. The reversioners were allowed to recover the title deeds from A.

*Jenner v. Morris* (1866), L. R., 1 Ch. 603, 3 De G. F. & J. 45, was an action for raising portions out of a settled estate. The life tenant took away, during the pendency of the suit, a number of the leases comprised in the estate to Paris. Under the order of the Court, he



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brought the whole of the title deeds and leases into Court. The purposes of the suit having been satisfied, and the portions having been raised by mortgage, the life tenant applied to have the leases and the title deeds. It was decided that he could not obtain them without the consent of the mortgagees, as he had taken some of them to Paris.

A. died indebted to his bankers, who held some title deeds of his property as security for advances and overdrafts. His widow, and executrix, was empowered by his will to charge his real estate in aid of his personalty. She drew money from the bank on account of the testator's executors, and deposited other title deeds of the estate as further security. The sum thus drawn was misapplied by her. The bank was held entitled to retain the deeds against the other executors. *Farhall v. Farhall* (1869), L. R., 7 Eq. 286, 38 L. J. Ch. 281.

In *re Burnaby's settlement* (1889), 42 Ch. D. 621, 58 L. J. Ch. 664, 61 L. T. 22, an equitable tenant for life of settled land was declared to be entitled to the custody of the title deeds, upon his undertaking not to part with the deeds except with the consent of the trustees, and to produce them at all reasonable times.

An executor, who, under a power in the will, carried on business on leasehold premises of the testator, surrendered the lease and took a renewed lease in his own name. This lease he subsequently deposited to secure money advanced to him which he used for his own purposes. Under a consent order in a suit for the administration of the testator's estate the leasehold property was sold, the equitable mortgagee giving up the lease for the purpose of carrying out the sale, without prejudice to his rights. Upon an application for payment out of the proceeds of the sale, it was held that the equitable mortgagee could not have held the deeds against the beneficiaries having prior rights in equity, and was therefore not entitled to the proceeds. *In re Morgan, Pillgrem v. Pillgrem* (C. A. 1881), 18 Ch. D. 93, 50 L. J. Ch. 834, 45 L. T. 183, 30 W. R. 223.

A trustee of a settlement is not entitled to title deeds of property not included in the settlement. *Jenner v. Jenner* (1866), L. R., 1 Eq. 361, 35 L. J. Ch. 329. Nor will a legal mortgagee be assisted by the Court in obtaining delivery from a puisne mortgagee of title deeds which are of a subsequent date to his own mortgage, and deal only with the equity of redemption. *Green v. Foster* (1883), 22 Ch. D. 566, 52 L. J. Ch. 470.

A termor is not entitled against the freeholder in the absence of express grant to the possession of deeds relating to the freehold. *Whitfield v. Fausset* (1749), 1 Ves. Sen. 387; *Harper v. Faulder* (1819), 4 Mad. 129; *Webb v. Lyngington* (1803), 8 Ves. 322; *Hotham v. Somerville* (1842), 5 Beav. 360; *Wiseman v. Westland* (1826), 1 Y. & J. 117.

No. 14. — *Foster v. Crabb.* — Rule.

Where, on a contract for the sale of land, the abstract is to be made at the vendor's expense, the purchaser is entitled to the possession of the abstract; but if the contract goes off, the right to the possession of it reverts to the vendor. *Roberts v. Wgatt* (1810), 2 Taunt. 268, 11 R. R. 6.

The right of possession and property in a deed may be severed from the ownership of the subject-matter by the owner making a gift of the deed. "If the feoffee granteth the deed to the feoffor, such grant shall be good, and then the deed and the property thereof belong to the feoffor. . . . If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed — *viz.*, the parchment and wax — to another, who may cancel and use the same at his pleasure." Co. Litt. 232 *a, b* (see 9 ed. 4, 53, pl. 15; see also per GAWDY, J., in *Kelsack v. Nicholson*, Cro. El. 478, 496; *Barton v. Gainer* (1858), 3 H. & N. 387, 27 L. J. Ex. 290; *Howes v. Prudential Ass. Co.* (1883), 49 L. T. 133; *Edwards v. Jones* (1836), 1 My. & Cr. 226).

## AMERICAN NOTES.

The principal cases, from No. 11 to No. 18, inclusive, have little applicability in this country. See 3 Pomeroy Equity Jurisprudence, sect. 1377, citing the Leathes case. The general topic of the custody and production of title deeds, is treated by Pomeroy at sects. 205–207, 764. Mr. Beach cites none of these cases in his Equity Jurisprudence except No. 18, and none of them is cited in Devlin on Deeds. The custody and possession of title deeds in this country is of very small importance, because there is in every State a system of public registration of deeds. The importance given in English law to the possession of title deeds is exceptional, and probably without parallel in the laws of any other country. In Scotland, as well as in America, the subject is of trifling importance. — R. C.

No. 14. — *FOSTER v. CRABB.*

(C. P. 1852.)

## RULE.

WHERE several have an interest in a deed, the title to the possession of it is ambulatory; and any of the parties interested having possession may retain it against the other.

**Foster v. Crabb.**

21 L. J. C. P. 189-194 (s. c. 12 C. B. 136; 16 Jur. 603).

*Deed. — Possession. — Detinue. — Beneficiary and Trustee.*

[189] A beneficiary under a trust cannot maintain detinue for the deed under which he claims, against a bailee of the trustee.

Where several have interest in a deed, the title to the possession of it is ambulatory: and any of the parties interested having possession may retain it against the other.

Detinue for an indenture bearing date the 20th of September, 1842, and made between one George Ball of the first part, the plaintiff of the second part, and one David Colombine and Edward Bridges Swindall of the third part, and purporting to be a grant of an annuity of £100 from the said George Ball to the plaintiff, for the life of the said George Ball, &c.

Plea — That by the said deed, after reciting, amongst other things, that the plaintiff had contracted and agreed with the said G. Ball for the purchase of an annuity of £100 for and during the life of the said G. Ball, for the sum of £650, to be subject to re-purchase upon the terms thereafter mentioned, that upon the treaty for the said purchase it was agreed that the said annuity should be secured by a conveyance of the hereditaments and premises thereafter described, and an assignment of the policy thereafter recited, upon the trusts and with the powers thereafter expressed and contained of and concerning the same respectively, and that the said annuity should be further secured by the covenants thereafter contained and by the warrants of attorney thereafter respectively recited; it was, by the said deed, witnessed, that in consideration of the sum of £650 sterling to the said G. Ball, paid by the plaintiff at or before the execution of those presents, he, the said G. Ball, did grant, bargain, and sell unto the plaintiff, his executors, &c., one annuity of £100 sterling to be paid and payable for and during the life of him, the said G. Ball, and to be charged and chargeable upon the hereditaments, &c., thereafter respectively released and assigned, to have and to take the said annuity unto the plaintiff, his executors, &c., for and during the life of the said G. Ball, to be paid and payable as therein mentioned; that in consideration of the said sum of £650 so paid to the said G. Ball by the plaintiff as thereinbefore was mentioned, and in consideration of the sum of

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No. 14. — *Foster v. Crabb*, 21 L. J. C. P. 190.

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10s., &c., he, the said G. Ball, had granted, \*bar- [\*190] gained, sold, and released, and by the said deed (which in respect of such hereditaments and premises secondly thereafter described as were of freehold tenure, and for the purpose of barring the estate tail in remainder of the said G. Ball therein, were intended to be enrolled in Her Majesty's High Court of Chancery in Ireland, in pursuance of the act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland), did grant, bargain, sell, and release unto the said D. Colombine and E. B. Swindall (such parts thereof as are of freehold tenure, being in their actual possession by virtue of a bargain and sale to them thereof made by the said G. Ball, in consideration of 5s., by indenture bearing date from the day next before the day of the date of the said deed, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale and by force of the statute made for transferring uses into possession), their heirs, &c., and which the said G. Ball had an estate, property, right, and title to, as therein mentioned, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the aforesaid messuages, farms, lands, and other hereditaments, and all the estate, right, title, interest, use, trust, property, profit, claim and demand whatsoever of the said G. Ball, in, to, and upon the same hereditaments and premises, to have and to hold the hereditaments and premises first thereinbefore described, &c., subject to the life estate of the said G. Ball, the father of the said G. Ball, therein, and as to the lands of Priors-town and Killarty, with the appurtenances, to the said annuity of £150 by the therein recited indenture of the 23rd of February, 1821, secured to and subject to the said sum of £4,500 by the therein recited indenture of the 15th of March, 1851, secured for the benefit of M. J. Ball, E. Ball, and L. Ball, and to the therein mentioned term of 500 years for securing the same, and to the sum of £2000 by the same indenture secured for the benefit of the other children of the said G. Ball, the father, and Sarah, his wife, in case there should be any such other children, unto and to the use of the said D. Colombine and E. B. Swindall, their heirs and assigns, during the life of him, the said G. Ball, party thereto, without impeachment of waste. And to have and to hold such of the hereditaments and premises secondly thereinbefore described



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and intended to be thereby released and conveyed, as were of freehold tenure, subject to the life interest of the said G. Ball, the father, therein, unto, and to the use of the said D. Colombine and E. B. Swindall, their heirs and assigns, for all such estate and interest as the said G. Ball, party thereto, could, by the said deed, lawfully create therein, and absolutely freed and for ever discharged from the estate tail of the said G. Ball, party thereto, under the said recited indenture of the 15th of March, 1821, or otherwise. And to have and to hold such of the hereditaments, &c., as are of leasehold tenure, but subject to the life interest of the said G. Ball, the father, therein, unto the said D. Colombine and E. B. Swindall, their executors, &c., for all the term or terms of years now to come and unexpired therein. But, nevertheless, as to the hereditaments thereinbefore described, &c., and for the trusts and subject to the powers and provisions hereinafter expressed and declared of and concerning the same, that is to say, upon trust that if the said annuity of £100, or any part thereof, should at any time or times thereafter be in arrear for the space of three months, D. Colombine and E. B. Swindall, or the survivor of them, or the heirs, &c., of such survivor, their or his assigns, should by and out of the rents, or by bringing actions against the tenants or occupiers of the same hereditaments and premises respectively for the recovery of the rents, or by such other ways and means as to them or him should seem meet, levy and raise such sum or sums of money as should be sufficient, or as they or he should think expedient for paying and satisfying to the plaintiff, his executors, &c., the said annuity of £100, and also the said premiums and other moneys thereafter covenanted to be paid, or such part thereof respectively as should be in arrear and unpaid, and all costs which the said plaintiff, his executors, &c., or the said D. Colombine and E. B. Swindall had been put unto by reason of the non-payment thereof respectively, or otherwise [\*191] wise in the \*execution of the trusts thereby created, and should pay and apply the monies so to be levied and raised, or a competent part thereof, in or towards payment or satisfaction of the said arrears, premiums, and other monies, costs, charges, and expenses accordingly, and pay the surplus, if any, unto the said G. Ball, party thereto, his heirs, &c., for his and their own use and benefit, and, subject to the trusts aforesaid, should permit and suffer the said G. Ball, party thereto, his heirs,

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&c., to receive and take the rents of the same hereditaments and premises for his and their own use and benefit. That for the consideration aforesaid he, the said G. Ball, party thereto, did thereby bargain, sell, and assign unto the said D. Colombine and E. B. Swindall, their executors, &c., a certain policy of assurance therein mentioned, and the sum of £200 thereby assured, and all other monies to be had or obtained under or by virtue of the said policy, together with full power and authority to ask, demand, sue for, recover, receive and give effectual releases and discharges for the said sum of £200 and all other monies to be had or obtained under or by virtue of the policy. To have, hold, receive, and take the said policy and sum of £200 and all other monies thereby assigned, or intended so to be, unto the said D. Colombine and E. B. Swindall, their executors, &c., upon and for the trusts, intents, and purposes, and with and subject to the powers and provisions hereinafter expressed and declared of and concerning the same. And the defendant avers, that under and by virtue of the said deed and the premises aforesaid, the said E. B. Swindall and the said D. Colombine took and had a property and a right and title to the said deed and to the possession of the same, and that after the making of the said deed, and before the plaintiff had obtained or had possession of the same, and before the said detention in the declaration mentioned, and before the commencement of this suit, to wit, on the 26th day of December, A. D., 1842, the said E. B. Swindall obtained and had possession of the said deed, and the said D. Colombine afterwards, to wit, on the 22nd day of July, A. D., 1845, died, and the said G. Ball, father of the said G. Ball, the party to the said deed, afterwards, to wit, on the day and year last aforesaid, also died. That afterwards and before the commencement of this suit, and before the said detention by the defendant of the said deed, and whilst the said E. B. Swindall was possessed of the said deed, to wit, on the 1st day of January, A. D., 1852, the said E. B. Swindall delivered the said deed to the defendant, to be by him kept and to be re-delivered by him to the said E. B. Swindall on request. That he detained and detains the said deed from the plaintiff for and on the behalf of the said E. B. Swindall, by the authority, licence, and request of the said E. B. Swindall to him, the defendant, for that purpose first given, granted, and made. That the plaintiff's property in, and right and title to, the said deed was and is derived and acquired from

and by reason of his being a party to the same and not otherwise. Verification.

Replication, that the said E. B. Swindall did not obtain, nor had he possession of the said deed before the plaintiff obtained or had possession of the same, *modo et formâ*.

Special demurrer, on the ground that the replication traversed immaterial matter; that it alleged a negative pregnant, and was ambiguous, uncertain, and double.

Joseph Brown, in support of the demurrer (April 28, 29). — The traverse in the replication is an immaterial one, and contains a negative pregnant. All that the replication states is, that Swindall never had possession of the deed before the plaintiff had possession of it. The authorities with respect to the custody of deeds going along with the interest, are collected in Thomas's Notes to *Lord Buckhurst's case*, 1 Co. Rep. 2, *b*, note O, and in Sugden's Vendors, 454, 11th ed. It is said that co-parceners or joint tenants have all an equal right to the custody of the deeds relating to their joint title. There is a dearth of authority with respect to deeds by which real property is granted to one person and chattels to another. The cases in the books are not cases of trustee and *cestui que trust*. In the present case, the *cestui que trust* is suing the agent of the trustee. A *cestui que trust* might

as well bring ejectment against his trustee holding for [\*192] him. At all events, the \* plaintiff has come to the wrong

Court; and it seems doubtful if even a Court of equity would order a trustee to deliver up a deed to his *cestui que trust*. In 13 Vin. Abr. "Faits," A, *a*, it is said that if a tenant in fee-simple gives the charters concerning the land to another, the donee, though he has nothing in the land, yet may justify the detaining them against the heir. If a joint-tenant, tenant in common, or parcener, destroy the thing in common, the other may have trover. — *Barnadiston v. Chapman*, reported in *Heath v. Hubbard*, 4 East, 121, and cited in 2 Wms. Saund., p. 47. But here there is no pretence for bringing trover. As to the point of form, the replication contains a negative pregnant, similar to that which existed in the replication in *Jones v. Jones*, 16 M. & W. 699, 16 L. J. Ex. 299, which was held bad. There, in trespass, the defendant pleaded *liberum tenementum* in J. S., and justified the trespass as the servant of J. S. and by his command, and the replication which averred that the defendant did not as the servant of J. S.,

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and by his command, commit the trespass, was held bad, as involving a negative pregnant.

J. Gray, *contra*. For the plaintiff it is submitted, that where a deed is to two persons, the first possessor can retain it, but that does not oust the right of the other to have the use of it. The declaration shows a good title in the plaintiff. The defendant shows that one of the trustees had first possession of the deed, and then delivered it to the defendant to keep for him. There are two propositions in the plea, the one stating the possession of the trustees, the other the delivery to the defendant. Why should not the plaintiff be at liberty to traverse either of those propositions? It is laid down in Dixon on Title Deeds, p. 20, that heir and feoffee have distinct properties in the deed. In 13 Vin. Abr. "Faits," Z, 15, it is laid down, that if land be given to A. for life, remainder over to several by deed, any of them who first gets the deed may retain it, and whoever has any land contained in a deed, where others have the residue of the land, yet he that has this parcel may on account thereof retain the deed, citing Bro. Abr. "Charters de Terre," pl. 53, and 4 Hen. VII. 10. It cannot be contended here that Swindall had a right to the deed after having parted with the possession. *Yea v. Field*, 2 T. R. 708 (1 R. R. 603), is an authority to that effect. There is a distinction between deeds and other chattels in respect of possession, as the title to deeds is affected by the possession being parted with. The plea could not be treated otherwise than as the plaintiff has treated it. The fallacy in the case seems to arise from forgetting that it lies on the defendant to make out an answer to the declaration, and that he chooses to rely on Swindall's having obtained possession first.

[CRESSWELL, J. Does it signify at all when or how Swindall obtained possession, if he did so before he delivered the deed to the defendant?]

[WILLIAMS, J. If this traverse came on for trial, how would the verdict be if Swindall had possession, but the plaintiff had possession before?]

The verdict would have been for the plaintiff. Supposing possession had been got by fraud, and then there was a delivery, the plaintiff would clearly have been entitled.

[CRESSWELL, J. The question involved in this case is whether the right of possession continues longer than the possession.]



[WILLIAMS, J. Put the case of a deed granting lands partly freehold, partly copyhold, partly in fee, and partly in borough English, who would be entitled to the custody?]

The first grantee who got possession of the deed. In Dixon, p. 22, Moore says, in argument, that a stranger having deeds ought to deliver them to heir or feoffee, whichever brings the first writ. The defendant here might have raised his defence under a general statement of title; or if he chose to rest his case upon first possession, the plaintiff had a right to traverse that allegation. As to the argument that this traverse involves a negative pregnant, the rule is laid down, that if the matter implied be not sufficient there is not a negative pregnant. Com. Dig. "Pleader," (R, 6).

*Cur. adv. vult.*

[\*193] \*JERVIS, C. J., now delivered the judgment of the Court.<sup>1</sup> — In the course of the argument of this case, we intimated our opinion that the replication did not amount to a negative pregnant, but we reserved our judgment on the main point, which is one of some difficulty. The declaration is in detinue for an indenture of the 26th of September, 1842, between Ball of the first part, the plaintiff of the second part, and Swindall of the third part, being the grant of an annuity from Ball to the plaintiff, of £100 for the life of Ball. The defendant pleads, in substance, that the indenture in the declaration mentioned is the grant of an annuity to the plaintiff for the life of Ball, secured upon certain freehold property belonging to Ball, and the conveyance of that freehold by Ball to Swindall, as trustee for the plaintiff, to secure that annuity; and that, after the making of the said deed, and before the plaintiff had obtained or had possession of the same, and before the said detention, and before the commencement of this suit, &c., Swindall had obtained possession of the deed, and delivered it to the defendant to be kept and delivered to him. The plaintiff replies, that Swindall did not obtain, nor had he possession of the deed before the plaintiff had obtained possession of the same, *modo et formâ*, &c., and to this there is a special demurrer. We must first consider the effect of the record in its present state, so as to ascertain the precise question raised by it. The demurrer admits that Swindall did not obtain and have possession of the deed before the plaintiff obtained and had

<sup>1</sup> JERVIS, C. J., CRESSWELL, J., WILLIAMS, J., and TALFOURD, J.

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possession of it; and we must, therefore, strike out of the plea the allegation upon which that replication is founded, and the plea will then stand, "That after the making of the deed and before the detention, and before the commencement of this suit, Swindall obtained possession of the deed and delivered it to the defendant." It is consistent with the plea so understood, that after the execution of the deed and before the detention, the plaintiff first had possession of the deed, and that then Swindall got possession of it, no matter how, and before the detention and commencement of this suit delivered it to the defendant. The question is, whether, under such circumstances, the action will lie. We are of opinion that it will not. It appears upon the face of the deed, as stated in the plea, that the plaintiff and Swindall have each an interest in the deed. The defendant contends, that Swindall has the greater interest, because the deed conveys the freehold to him. The plaintiff admits that he has an equal interest with himself, but no more, and we need not determine which of these propositions is correct, because, admitting that the plea is in this respect right, we nevertheless are of opinion that the action will not lie. The rule established by the second resolution of *Lord Buckhurst's case*, and by other authorities, is that he who has occasion to use a deed is entitled to the legal custody of it; but where two have an equal interest in a deed, and each may have occasion to use it, as for instance, where the same deed grants Whiteacre to A., and Blackacre to B., as it is manifest that both cannot hold the deed at the same time, to whom does the legal custody belong? If it were a chattel, it might be used in turn by several having an interest in it, but it is not so with a deed. That must remain in some custody until the occasion for using it may arise. In this respect there are but few authorities, for the cases relating to profert do not apply. In the case put, each has a common interest, and each may have occasion to use the deed, but both cannot hold it at the same time. The only way of avoiding unseemly contests for the possession, is to rule that he who first has it may keep it, and this seems to be the result of the only authority which bears directly upon the subject. In Vin. Abr. "Faits," (Z, pl. 15), it is laid down, from Bro. Abr. "Charters de Terre," and the Year Book, 4 Hen. VII. pl. 10, "that if land be given to A. for life, remainder over [to several] by deed, any of them who first gets the deed shall retain it; and, therefore

whoever has any land contained in the deed, where others have the residue of the land, yet he that has this parcel [\* 194] \* may on account thereof retain the deed." But this rule does not decide the point under dispute; for it does not follow that the right to hold a deed is permanently attached to the person who first gets it into his possession so as to prevent another having an equal interest in the deed from holding it even against the first possessor, should it afterwards come into his custody. The reason which gives to the first possessor a right to hold the deed as long as he retains it in his possession, gives the other party having an interest in the deed a right to keep it should it ever come into his custody. It is the interest which each has in the deed and the occasion which each may have to use it which gives to each the title to have it. In the case put, A. may hold the deed against B., because he has an interest in it, and may have occasion to use it, but B., who has a like interest in it, may also have occasion to use it; and, therefore, if he gets it from A. he may hold it against A. For fraud or force, which may be used to get possession of the deed, either party may, perhaps, have remedy against the other; but the title to the deed is ambulatory between those who have an interest in and may have occasion to use it, and each is entitled to keep the deed from the other so long as he actually retains it in his custody and control, but no longer. The case of *Yea v. Field* would seem to have been decided upon this ground. Conveyancers have questioned this decision, but in our opinion that case was properly decided, because, as Lord KENYON says, "the plaintiff did not show a better right to the deeds than the defendant." The defendant had, in common with the plaintiff, the mortgagee, an interest in the deed; like him he might have occasion to use it, the title, therefore, was ambulatory, and as the defendant had possession of the deeds he was entitled to retain them against the plaintiff, who had no better title than the defendant, notwithstanding he represented the mortgagee who first had possession of them. For these reasons we are of opinion that the defendant is entitled to judgment.

*Judgment for the defendant.*

#### ENGLISH NOTES.

*Yea v. Field* (referred to at pp. 677 & 680, *supra*) was a strong case. There, the defendant, who was the purchaser of a small part of an estate,

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had taken a covenant from the vendor to produce the title deeds when necessary. The deeds afterwards came into the defendant's possession on his taking a mortgage of the other part of the estate, and he subsequently assigned the mortgage to the plaintiff without mentioning the deeds. It was held that the plaintiff could not recover the deeds from the defendant. Lord KENYON said: "Although at the time of the purchase the defendant had no right to the possession of the deeds, yet since that time they have by accident come into his possession; and the plaintiff cannot recover them from him." In *Denton v. Denton* (1844), 7 Beav. 388, where the tenant for life had felled timber improperly, he was ordered to bring the deeds into Court.

The title deeds may in some cases be ordered to be deposited in the Court. So where the tenant for life delivers the deeds to a person who has no interest, the remainderman can have them brought into Court. *Ford v. Perring* (1789), 1 Ves. Jr. 72. In *Ex parte Rogers: In re Pyatt* (1883), 26 Ch. D. 31, 53 L. J. Ch. 936, it was held that the trustee in bankruptcy of a husband whose wife was the legal tenant for life (but not to her separate use) had no absolute right to the custody of the title deeds of the settled land during the coverture. They were ordered to be brought into Court.

In *Wright v. Robotham* (C. A. 1886), 33 Ch. D. 106, 55 L. J. Ch. 791, 55 L. T. 241, 34 W. R. 668, the owner in fee simple of lands gave her title deeds to her solicitors. She afterwards settled the estate, under which settlement the plaintiff acquired vested interest in part of the estate after her death, and the remainder of the property was vested in the heir-at-law of the settlor, who could not be found. The plaintiff was not allowed to obtain the title deeds without the concurrence of the heir-at-law. The deeds were, however, ordered to be deposited in the Court, with liberty to the plaintiff to inspect and take copies thereof.

When the purposes for which the deeds were brought into Court are satisfied, the deeds will be ordered to be delivered to the tenant for life who would otherwise be entitled to the possession. This was ordered in an early case by Lord NORTHINGTON (*Webb v. Lymington*, 8 Ves. 322 n.), and notwithstanding a questionable report of a case of *Hicks v. Hicks*, 2 Dick. 650, where it is stated that Lord KENYON refused to follow the precedent, it would doubtless be followed by the Court as constituted under the Judicature Acts.



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No. 15. — **Manners v. Mew**, 29 Ch. D. 725. — Rule.

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No. 15. — **MANNERS v. MEW.**

(CH. D. 1885.)

No. 16. — **BANK OF NEW SOUTH WALES v. O'CONNOR.**

(P. C. 1889.)

**RULE.**

WHERE a mortgage deed does not contain a grant of the documents of title, and there has not been at the time of completion any promise to deliver them, the mortgagee is not entitled to recover the deeds as against a person deriving from the mortgagor an interest in the subject-matter.

But if the title deeds have been handed over on completion, the mortgagee may retain them, as against the mortgagor and his assignees, until he is paid off. For this purpose a tender properly made and improperly rejected is not equivalent to payment.

**Manners v. Mew.**

29 Ch. D. 725-735 (s. c. 54 L. J. Ch. 909; 53 L. T. 84).

*Legal Mortgage. — Subsequent Deposit of Deeds. — Priority.*

[725] A legal mortgagee had asked for the deeds which the mortgagor, who was his solicitor, made excuses for not giving to him. The mortgagor afterwards deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage: —

*Held*, in an action by the legal mortgagee for foreclosure, that he had not been guilty of fraud or negligence amounting to fraud, and that he could not be postponed to the mortgagee by deposit by reason of any negligence short of that:

*Held*, that the legal mortgagee was entitled to recover the deeds from the mortgagee by deposit, notwithstanding he was a purchaser for value without notice: and that sect. 25, sub-sect. 11, of the Judicature Act, 1873, did not alter the rule of law on the subject.

In 1872 the plaintiff, W. W. Manners, lent to his solicitor, J. A. Mew, £1000, the repayment of which was secured by a deed of 10th inst. of May, 1872, whereby Mew conveyed to Manners

No. 15. — *Manners v. Mew*, 29 Ch. D. 725, 726.

certain hereditaments in the Isle of Wight, subject to redemption on payment of £1000 and interest. Manners at the time asked Mew for the deeds, and was told by him that they were all right in London, and that Manners could have them whenever he liked. On several subsequent occasions Manners asked Mew for the deeds, and was told that they were in safe custody for him, but that the matter had escaped Mew's memory, and he would obtain them and send them to Manners. Some time afterwards, Manners spoke to the London agents of Mew about the deeds, and was told by them that they knew nothing about the deeds. In 1881 Manners changed his solicitors, and it was then found that the deeds were in the possession of C. J. Mursell and C. E. Nobbs, under these circumstances. In 1873 the deeds were deposited by Mew with the National Provincial Banking Company, as security for an advance. In August, 1873, H. R. Hooper, a solicitor in the Isle of Wight, advanced to Mew £1000, with which the bank was paid off, and \*the deeds were delivered to Hooper by [\*726] way of equitable mortgage for securing the repayment of the £1000 and interest. In 1875 Hooper became a partner with Mew, and remained so until the year 1881. By an indenture of settlement made in 1878 on the marriage of Hooper, he assigned the £1000 to Mursell and Nobbs on the usual trusts, Hooper keeping the deeds for them. Hooper, Mursell, and Nobbs denied that they had any notice of the mortgage to Manners.

In 1882 Manners brought this action against Mew, Hooper, Mursell, and Nobbs, claiming foreclosure and delivery of the deeds.

Barber, Q.C., and Badcock, for the plaintiff, stated the case and examined the plaintiff as a witness:—

The plaintiff is prior in time and has the legal estate, and ought to have priority. No doubt he has not got the deeds, but that is not through any negligence of his. Mew was his solicitor, and was the proper person to keep the deeds. *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch. D. 482; 53 L. J. Ch. 629. The plaintiff has also a right to recover the deeds. *Cooper v. Vesey*, 20 Ch. D. 611; 51 L. J. Ch. 321.

Giffard, Q.C., and C. Healey, for the equitable mortgagees:—

A legal mortgagee who neglects to obtain the deeds assists the mortgagor in committing fraud, and will not be allowed to avail himself of his legal estate against a purchaser for value without

notice; *Briggs v. Jones* L. R., 10 Eq. 92; *Heath v. Crealock*, L. R., 10 Ch. 22; 44 L. J. Ch. 157 is still law. *Clarke v. Palmer*, 21 Ch. D. 124; 51 L. J. Ch. 634, which is referred to in *Northern Counties of England Fire Insurance Company v. Whipp*, is an authority for the equitable mortgagees. As to the delivery of the deeds there is no case in which that has been ordered by a Court of law after a Court of equity has refused to interfere. *Head v. Egerton*, 3 P. Wms. 280. Even if the plaintiff could have maintained an action of trover for the deeds, this Court is not bound by the strict rules of law. Where money has been advanced without notice, the person who has advanced it will not be deprived of what he has in his possession by a Court of equity; and by [\*727] sect. 25, sub-sect. 11, of the \*Judicature Act, 1873, the rules of equity are now to prevail and override the old rules of the common law.

Tanner, for the trustee in Mew's bankruptcy.

NORTH, J. (after stating the facts of the case, continued):—

The question is, whether the omission by the plaintiff to obtain under those circumstances possession of the title deeds is to postpone his legal mortgage for the benefit of a person with whom about twelve months afterwards the deeds were deposited.

The rule as to what is necessary to postpone a legal mortgage, although it has been the subject of a difference of expression of opinion from time to time, seems to me now clearly settled and defined. The case of *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch. D. 482; 53 L. J. Ch. 629, did not profess to, and of course could not, make the law, but it laid down what the law was in the clearest possible terms. That was a case in which there was a good legal mortgage, but the mortgagor was the manager of a bank, who were the mortgagees. The deeds were deposited in the safe of the bank, where they ought to have been, but the mortgagor, who had a key of the safe, took the deeds out and deposited them with a mortgagee from himself, concealing the fact that the bank had a mortgage; and it was said, under these circumstances, that what had been done amounted to a fraud, or such gross negligence on the part of the company as to postpone their security. The decision was, that what must be shown in order to postpone a legal mortgage is fraud and nothing less. Gross negligence short of that will not do. The gross negligence may be such that, looking to the circumstances of the

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particular case, the Court will see that there was fraud; or it may be in itself, or coupled with other circumstances, sufficient to show fraud; and if that is the result at which the Court arrives, the legal mortgagee is postponed; but unless that result is arrived at the legal mortgagee will not be postponed.

Now the judgment of the Court of Appeal was a considered judgment given by Lord Justice FRY, and the passages which I am going to read are, I think, very clear (26 Ch. D. 487):

“The question \* which has thus to be investigated is — [\* 728]

What conduct in relation to the title deeds on the part of a mortgagee who has the legal estate, is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate. It has been contended on the part of the plaintiffs that nothing short of fraud will justify the Court in postponing the legal estate. It has been contended by the defendant that gross negligence is enough.” Therefore the issue is clear and defined. Then (26 Ch. D. 490, 491), the LORD JUSTICE refers to *Evans v. Bicknell*, 6 Ves. 174 (5 R. R. 245), and the result is put in this way: “ ‘There must be either direct fraud, or negligence amounting to evidence of fraud, to induce this Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed.’ ” Then a little further on he says: “That fraud and fraud alone was the ground for postponing the legal estate was, we think, the opinion of Lord HARDWICKE in *Le Nere v. Le Nere*, Amb. 436, 447: ‘Fraud or *mala fides*, therefore,’ he said, ‘is the true ground on which the Court is governed in the cases of notice.’ ” Then the learned Judge referred to *Barnett v. Weston*, 12 Ves. 130 (8 R. R. 319), and to *Rateliffe v. Barnard*, L. R., 6 Ch. 652, and then he points out that from this *consensus* of expression as to the true rule there was no real departure in the language used by Lord CRANWORTH in the cases of *Colyer v. Finch*, 5 H. L. C. 905, and of *Roberts v. Croft*, 2 De G. & J. 1. Then he puts four heads under which he says the cases on the subject may be classed. The first is, “Where the legal mortgagee or purchaser has made no inquiry for the title deeds, and has been postponed, either to a prior equitable estate, as in *Worthington v.*



*Morgan*, 16 Sim. 547, or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke v. Palmer*, 21 Ch. D. 124; 51 L. J. Ch. 634. In these cases the Courts have considered the conduct of the mortgagee in [\*729] making \*no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity, and in the latter case that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent." I pass from that head with this remark, that in this case there never was a prior equity, and it would require a strong case to come to the conclusion that the person who was a subsequent incumbrancer could get any relief under that head. Then the second head is this: "Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett v. Weston*, 12 Ves. 130 (8 R. R. 319); *Hewitt v. Loosemore*, 9 Hare, 449, and *Agra Bank v. Barry* L. R., 7 H. L. 135, 157." Then two other heads are given, which I omit now, because they do not bear on the present case. Then there are two groups given in which the cases fall where the mortgagee who has received the deeds has afterwards parted with them. I do not dwell upon that in detail, because that is not this case. Then a little further on there are quoted some observations of Lord SELBORNE in the case of *Agra Bank v. Barry*, in the House of Lords, to this effect (26 Ch. D. 493): "It has been said in argument, that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case." Then a

little further on the LORD JUSTICE sums up the conclusions at which the Court arrived in this way: "The authorities \* which we have reviewed appear to us to justify the following conclusions: (1) That the Court will postpone the prior legal estate to a subsequent equitable estate: (a) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence where such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate. But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner." Mere carelessness there includes, in my opinion, gross carelessness, if there is any distinction; from the words which follow: "Now to apply the conclusions thus arrived at to the facts of the present case. That there was great carelessness in the manner in which the plaintiff company through its directors dealt with their securities seems to us to admit of no doubt. But is that carelessness evidence of any fraud? We think that it is not. Of what fraud is it evidence? The plaintiffs never combined with Crabtree to induce the defendant to lend her money. They never knew that she was lending it, and stood by. They can have had no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the plaintiff company, and accordingly has no tendency to convict them of fraud." Now reading those words again as applicable to the present case, I would ask of what fraud by the plaintiff is there evidence? He never combined with Mew to induce Hooper to lend his money. He never knew that Hooper was lending it, or stood by. He could have had no motive to desire that his deeds should be abstracted and his title clouded. As the LORD JUSTICE said: "Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the plain-

[\* 731] tiff company, and accordingly \* has no tendency to convict them of fraud." Those words seem to me to be precisely applicable to the present case; and the full consideration which the law received there makes it almost unnecessary for me to refer to any other case, but I wish to call attention to *Ratcliffe v. Barnard*, L. R., 6 Ch. 652, 654, which is one of the decisions there followed. I do so because Lord Justice JAMES puts the point very neatly and tersely: "This case is reasonably plain upon either of the two grounds. First, as to the alleged negligence, which is assumed by the plaintiff to be a ground for postponing Barnard, who has got in the legal estate as security for a debt antecedently due. The Lord Justice TURNER has, in *Hunt v. Elmes*, 2 D. F. & J. 578, expressed the only principle upon which in this Court a man will have his legal security taken away. He must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud. If a man abstains from inquiry under such circumstances that the Court will infer that he abstained in order to deprive himself of knowledge, then he will not be allowed to hold the property merely because he did not inquire. He has, in such a case, wilfully shut his eyes to the facts."

Then it is said that the acts of Colonel Manners show that he was guilty of gross negligence, from which I ought to draw the inference that there was fraud. It seems to me that there was not gross negligence on his part, or any negligence at all.

[His Lordship then referred to the remarks of Lord Chancellor CAIRNS in *Agra Bank v. Barry*, L. R., 7 H. L. 135, 147, and of Lord CHELMSFORD in *Espin v. Pemberton*, 3 De G. & J. 547, 556, as showing that facts very similar to those found in the present case were, in the opinion of those eminent Judges, not even evidence of negligence, much less evidence of such negligence as would prove fraud.]

Two cases were relied upon by the defendants' counsel as assisting them in that part of the case; but they do not seem to me to have that effect. The first is *Briggs v. Jones*, L. R., 10 Eq. 92. All that was decided there was that a person who had a legal mortgage had lost priority by parting with the mortgage [\* 732] deed to a person \* who borrowed money upon it. That was under the second head referred to in the *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch.

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D. 482; 53 L. J. Ch. 629, which is quite distinct from the present; in fact it was adopting the principle of the well-known case of *Perry-Herrick v. Atwood*, 2 De G. & J. 21. The other case is *Clarke v. Palmer*, 21 Ch. D. 124; 51 L. J. Ch. 634. The facts there were very complicated, but the certificate of the chief clerk showed that the Rev. J. Preston was first mortgagee of lots 1 and 2; that Sir J. R. Milbanke was second mortgagee of lots 1 and 2, and first mortgagee of lot 3; that E. P. Clarke was third mortgagee of lots 1 and 2; and second mortgagee of lot 3. Now that certificate was not objected to so far as it found that Preston was first mortgagee of the first lot; but there was a motion to vary the certificate, as being wrong in making Milbanke the second mortgagee and Clarke the third. The whole question was not whether Preston was first and Milbanke second, or *vice versâ*, but whether Milbanke and Clarke ought to be second and third, or Clarke second and Milbanke third. If there was any resemblance between that case and the present, it would be as regards the question between Preston and Milbanke; but that was the point settled by the Chief Clerk's certificate, as to which there was no summons to vary: and it was not gone into. The case was like *Perry-Herrick v. Atwood*, and the only question the Court had to decide was whether the second mortgagee, who had done what he could to get the deeds, had got as great an advantage over the legal mortgagee as if he had actually got the deeds. That is a point with which I have nothing whatever to do here, and there was no observation made by the VICE-CHANCELLOR there in any way bearing on the point I have to decide now. Those cases do not touch the present at all.

The second part of the case is this. It is said that the defendant Hooper and the defendants who claim under him had the deeds deposited with them *bonâ fide* and without notice, and that it is contrary to the course of this Court to allow the plaintiff, the first legal mortgagee, to recover those deeds here. As regards his legal right to do so, that is quite free from doubt, and it is sufficient to refer to the case of *Newton v. Beek*, 3 H. & N. 220, 222; 27 L. J. Ex. 272, on the subject: \*His [\*733] Lordship then stated the facts of that case. The judgment is, "The learned Judge was correct in his ruling. The operation of the mortgage was to give the plaintiff a property in all the deeds relating to the mortgaged land. Although he was in



error in supposing that the real deed was delivered to him, that did not prevent it from being his property, and consequently he is entitled to maintain an action of detinue or trover in respect of it." Therefore the legal right of the plaintiff is perfectly clear; but then it is said that if a person has, like the defendant in the present case, *bonâ fide* got the deeds, it is not the course of a Court administering equity to direct him to hand them over. Upon that point the cases of *Head v. Egerton*, 3 P. Wms. 280, *Hunt v. Elmes*, 28 Beav. 631, and *Heath v. Crealock*, L. R., 10 Ch. 22; 44 L. J. Ch. 157, are three out of many, and it is quite clear that when a Court of equity was giving equitable relief and nothing else, the defence that a man had got the deeds *bonâ fide* as a purchaser for value without notice, was considered a sufficient reason for the Court of equity holding its hand and saying it would not take them away from him. It is said that that is the rule I ought to follow now, and that I ought to decline to order the deeds to be delivered up. It is said that, whatever the legal right might be, if an action were brought at law, yet since the Judicature Act of 1873 the Court must only do what a Court of equity would have done before the Act, upon the ground that the 25th section of the Act, sub-s. 11, provides: "That in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." But I do not see that there is any conflict or variance in such a case as this, because the general rule was that a legal Court was the proper Court to give a legal remedy, and must give it, while in an equitable Court equitable remedies only were given. And a Court giving equitable relief only would not interfere to hand over a document which might be the subject of an action at law, but would leave the plaintiff to take proceedings at law. That, however, only applied to cases where the

Court of equity in giving equitable relief could not give [\*734] legal relief, and did not apply to any case in which the

Court of equity could give legal relief as well as equitable relief. There are one or two very good illustrations of that principle. *Williams v. Lamb*, 3 Bro. C. C. 264, 265, was a case in which the plaintiff brought a suit to recover dower; that is to say, the plaintiff came in equity to obtain legal relief in respect of a legal matter, with respect to which a Court of equity had precisely

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the same jurisdiction as a Court of law. It was one of the few cases in which a Court of equity granted legal relief. The plea of purchase for value without notice was set up, and the LORD CHANCELLOR said: "The only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim. He therefore overruled the plea." There are other similar decisions, but I do not refer to them more particularly because Lord WESTBURY referred to them in *Phillips v. Phillips*, 4 D. F. & J. 208, 216. The LORD CHANCELLOR says: "There appear to be three cases in which the use of this defence is most familiar. First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in *Bassett v. Nosworthy*, Finch, 102), or by a tenant for life, for the delivery of title deeds (which was the case of *Wallwyn v. Lee*, 9 Ves. 24; 7 R. R. 142), and the defendant pleads that he is a *bond fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice the Court gives no assistance, — that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with courts of law. Thus it was decided by Lord THURLOW in *Williams v. Lumbe*, 3 Bro. C. C. 264, that the defence could not be pleaded to a bill for dower, and by Sir John LEACH in *Collins v. Archer*, 1 Russ. & My. 284, that it was no answer to a bill for fines. In those cases the Court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief." Therefore, if the effect of the Judicature Act had merely been to say that every Court must give relief in every \*case [\*735] brought before it, and that a Judge of the Chancery Division sitting as a Court of equity must give legal relief — if that was the whole effect of the Act of Parliament, the result would be that sitting here as a Court of equity, I should have to administer legal relief also; and if the action had been brought at law that relief would have been given, as *Newton v. Beck*, 3 H. & N. 220; 27 L. J. Ex. 272, clearly shows. Therefore, if recourse be had to the section of the Judicature Act which is relied upon, the course in equity and at law was the same before the Act passed in this

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respect as it has been since, and there is no variance or conflict. The practice I am asked to follow as being the course of the Court of Chancery is not the course which would have been followed by a Court of equity where the subject was one in respect of which the Court of equity had legal powers as well as equitable powers. But independently of that, the Judicature Act in my opinion has a much larger scope. It says that every Court is to administer everything, — legal relief and equitable relief, and in the present case I am bound under the Act to administer legal relief and give the relief which the plaintiff would have had at law. If authority were wanted, the case of *Cooper v. Vesey*, 20 Ch. D. 611; 51 L. J. Ch. 321, is a complete and binding authority. It is in fact undistinguishable from the present case, and I have gone fully into the law only because a point has been set up here which was not raised there.

It seems to me, therefore, that the plaintiff is entitled to the relief which he asks on both heads, and there must be the ordinary decree for foreclosure with a declaration that the plaintiff is the first mortgagee.

**Bank of New South Wales v. O'Connor.**<sup>1</sup> (On appeal from the  
Supreme Court of Victoria.)

14 App. Cas. 273–285 (s. c. 58 L. J. P. C. 82; 60 L. T. 467).

*Title Deeds. — Mortgage by Deposit. — Remedies of Mortgagor.*

[273] Where there has been an equitable deposit of deeds to secure repayment of a loan, an action of detinue cannot be maintained therefor prior to repayment. The remedy is by a suit for redemption, or by summary application for the deeds on terms of substituting for the security a sum of money equal to the amount secured with a proper margin. In cases of legal or equitable mortgage, a tender properly made and improperly rejected is not equivalent to payment.

Appeal from a judgment of the Supreme Court (Aug. 26, 1887) upon points reserved at the trial, so far as the same awarded to the respondent £1500 subject to a set-off on counter-claim, and from another judgment (Nov. 2, 1887) affirming a verdict in favour of the respondent and dismissing the appellant's motion for a new trial.

<sup>1</sup> Present: Lord WATSON, Lord FITZGERALD, Lord HOBHOUSE, Lord MACNAGHTEN, and Sir William GROVE.

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The facts and proceedings are stated in the judgment of their Lordships.

The points reserved were (1) whether the evidence objected to on the ground of remoteness was admissible; (2) whether the verdict on the counter-claim should not be reduced to the amount claimed.

Finlay, Q.C., and Lofthouse, for the appellant, contended that the damages in question were too remote, and that the evidence thereof was inadmissible. There was no liability for the alleged injury to the respondent's business resulting from his inability to pay wages. The falling off of his business should be attributed \*to other circumstances than the detention of [\*274] his deeds. If any damages were traceable to the appellant's detention, still those awarded by the jury were grossly excessive. Reference was made to *The Notting Hill*, 9 P. D. 105, 113; 53 L. J. P. D. & A. 56; *British Columbia Saw Mill Company v. Nettleship*, L. R., 3 C. P. 499; 37 L. J. C. P. 235.

Channell, Q.C., and Gould, for the respondent, contended that the damages were not too remote, and naturally followed from the wrongful act of the appellant. They were not so excessive as that they ought to be interfered with. With regard to the form of action detinue will lie where the detention is wrongful: see *Chilton v. Carrington*, 15 C. B. 95; 24 L. J. C. P. 10; *Phillips v. Hayward*, 3 Dowl. 362; *Williams v. Archer*, 5 C. B. 318; 27 L. J. C. P. 82. Assuming that an action of detinue lies, on the question of the amount of damages, see *Grébert-Borgins v. Nugent*, 15 Q. B. D. 85; *Moore v. Shelley*, 8 App. Cas. 285; *Bodley v. Reynolds*, 8 Q. B. 779; *Brewer v. Dew*, 11 M. & W. 625; *Davis v. Oswell*, 7 C. & P. 804; *Waters v. Towers*, 8 Ex. 402.

Finlay, Q.C., replied.

March 9. 1889. The judgment of their Lordships was delivered by

Lord MACNAGHTEN:—

The question involved in this appeal is one of some importance to persons who may be concerned in lending or borrowing money on mortgage in Victoria.

There are no facts in dispute.

O'Connor, the plaintiff in the action, was a coach-builder in Beechworth, a comparatively small town in daily communication by rail with Melbourne, and distant, apparently, some few hours'



journey from that city. He was in a fair way of business. His profits, he says, averaged from £400 to £500 a year, and his business seems to have been increasing down to the end of 1886.

O'Connor kept an account with the Beechworth branch [\*275] of the \*Bank of New South Wales from October, 1884.

In the course of the next two years he somewhat crippled his resources by contesting a seat in the Legislative Assembly, and by incurring some expense in furnishing a house on the occasion of his marriage. He borrowed from his mother, Mrs. Pye, who lived in Melbourne, two sums of £150 and £200, without security, both of which he paid back with interest. He also incurred a debt of £100 to the bank. To secure that sum he deposited the title deeds of a small plot of ground where he carried on his business. The land is said to have been worth £200, and the buildings on it, which were of wood, and about eight years old, some £400 more. He acquired the property from his uncle by a voluntary conveyance, in January, 1886. He mortgaged it to the bank by a deed dated the 22nd of February, 1886, which was duly registered. The mortgage was in the form of an absolute conveyance in trust for sale. The proceeds were to be applied in payment of expenses, and then in satisfaction of the debt with interest, and the surplus was to be paid to the debtor as personal estate. The deed had a proviso that nothing therein contained should extinguish, prejudice, or affect any lien or security which the bank was entitled to in respect of the deposit of the title deeds relating to the property.

On the 24th of January, 1887, O'Connor's working account with the bank was in credit to the amount of £1 4s. 9d. On the following day it was overdrawn, and it was never again in credit. On the 4th of February, Hannaford, the manager of the bank at Beechworth, wrote to O'Connor, stating that his account was £61 overdrawn, and requiring him to pay in £125 to cover the overdraft and some bills maturing that day. Besides his working account and the account secured by the mortgage of February, 1886, O'Connor had a discount account with the bank. It comprised two classes of bills discounted for him by the bank, (1) bills of which he was indorsee, and (2) acceptances of his discounted at his request for the convenience of other persons. In reply to Hannaford's letter O'Connor called at the bank, and said that he could not pay in £125 straight off at such short notice.

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He seems to have satisfied Hannaford that the bills referred to in his letter were or would be provided for.

\* On Monday, the 14th of February, Hannaford wrote [\*276] again to O'Connor, stating that his working account was £67 overdrawn, that it was the balance day of the week, and that O'Connor must get the account largely reduced before 3 o'clock. He added that he hoped that O'Connor did not give out any wages cheques on Saturday. O'Connor went immediately to the bank, and assumed a somewhat indignant tone, apparently on the ground that he had been in the habit of having an overdrawn account. It was a strange way of doing banking business, he said, to send him a letter on Monday, knowing his wages cheques were all paid on Saturday. However, he got Hannaford to promise to honour some small cheques of his which were outstanding, and then he said, "One thing, you won't trouble me much longer with letters of this kind. I'll go to Melbourne some time this week and get enough money to carry on independent of the bank."

On Friday, the 18th of February, O'Connor called at the bank and said he was going to Melbourne to get the money to carry on his business. Thereupon, at his request, Hannaford consented to pay a bill for £12 15s. which would fall due on the next day. O'Connor promised to be back about Wednesday, the 23rd.

O'Connor went to Melbourne and saw his mother. She promised to lend him £600. She said at the trial he might have had £1000. She advanced him £300 in cash, on the terms that the money was to be used for lifting his deeds at the bank, and for no other purpose. He was to take his sister with him to the bank and hand over the deeds to her. The deeds were to be brought back or the money restored at once.

O'Connor returned to Beechworth on Saturday night. The wages of his men, which were due at 1 p. m. on that day, were unpaid. When he returned home he had only £6 or £8 of his own, and he owed about £20 for wages. The men reassembled for work on Monday, the 21st. He told them he would pay them at dinner time, but he failed to do so, and some of the men struck work then and there.

On the same day, Monday, the 21st — but whether before or after this occurrence is not stated — O'Connor went to the bank with his sister, taking with him his mother's money in a bag. Hannaford had made out O'Connor's account up to the 23rd of

[\*277] February, \*showing a balance of £371 3s. 4*d.* in respect of indebtedness and liability. The items shortly were as follows:—

|                           | £    | s. | d. |
|---------------------------|------|----|----|
| Secured account . . . . . | 103  | 12 | 0  |
| Working account . . . . . | 81   | 14 | 5  |
| Discount account:—        |      |    |    |
| As indorsee . . . . .     | 106  | 7  | 6  |
| As acceptor . . . . .     | 79   | 9  | 5  |
|                           | £371 | 3  | 4  |

O'Connor objected to the last item of £79 9s. 5*d.*, saying it was "monstrous," as the bills would not be due for months. He struck it out, and then tendered the balance and demanded his securities. Hannaford refused to hand them over unless the whole amount of debt and liability were cleared off, saying he had to obey instructions. O'Connor observed that he had to return the money or take back the deeds at once. Hannaford then said that he would send the deeds and bills to the head office in Melbourne. O'Connor, after consideration, said that he would take the money to Melbourne, and he asked for and obtained a copy of the document on which the bank relied. It does not appear that O'Connor told Hannaford, at that interview, how he was situated with his workmen, or that he asked for any further indulgence from the bank.

Instead of taking the money to Melbourne at once, O'Connor wrote a letter to his mother, which she seems to have mislaid. On Tuesday, the 22nd, she sent a reply in the handwriting of her son, a boy of about eight or nine years old, which said: "Ma went to the bank and found that the money did not come down. Ma is annoyed about it, as she expected the money to be there to-day. Ma said she does not want no humbugging with you." On receipt of this letter O'Connor went to Hannaford and said his mother had written to him an angry letter, and that he should now be unable to get money from her. On Thursday O'Connor took the money back to his mother.

On Saturday, the 26th of February, Hannaford wrote to O'Connor, saying that he had had a communication from [\*278] the head \*office, and that the bank would not insist on

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payment of the £79 9s. 5d., less rebate, though they were entitled to do so.

On the 28th of February the writ in this action was issued.

On the 8th of March the bank waived their claim to a general lien.

Under these circumstances, if O'Connor had brought an action for redemption on the day on which the writ was issued, he might possibly have been entitled to costs up to the 8th of March. On the other hand, if he had persisted in the action after the bank offered to release the securities on payment of the amount expressly secured, he would, according to the ordinary and settled practice of the Court, have had to pay the costs of the action.

A mortgagee is entitled to his principal and interest, and the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably. In *Cotterell v. Stratton*, L. R. 8 Ch. 295, Lord SELBORNE observes that this right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract, and that any departure from these principles would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions, and he goes on to point out that such a departure, instead of being beneficial to those who may have occasion to borrow money on security, would, in the result, throw them into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions. In the present case it is not easy to understand how the bank, or their manager, can be charged with vexatious or unreasonable conduct. It is admitted that Hannaford acted in good faith. Whether the claim to a general lien was well founded or not, there was some colour for it in the mortgage deed. Considering that the bank were careful to take a formal security for £100, it is difficult to suppose that they would have allowed O'Connor to get so deeply into their books, or that he would have assumed so \*bold and defiant a tone in his communications [\*279] with Hannaford, if it had not been taken for granted on both sides that the bank had some security in their hands.



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Hannaford was merely a subordinate, acting under instructions, as O'Connor knew. O'Connor had given no notice that he intended to draw a line at a certain point in the account. There was no opportunity of consulting the head office. Hannaford, therefore, seems to have taken a reasonable course in sending the deeds up to Melbourne, where Mrs. Pye lived. O'Connor apparently acquiesced at the time in the course proposed. That the affair was not completed in Melbourne was not the fault of the bank or the fault of Hannaford. Unless due to a capricious change of purpose on the part of Mrs. Pye, or to a determination on O'Connor's part to bring a speculative action, it must have been due to want of confidence created in Mrs. Pye's mind by O'Connor's failure to return the money to her at once. On the notes of the evidence there is nothing to account for it but this passage in O'Connor's deposition, — "My mother would not lend me the money again. She was angry with me."

The action, however, which O'Connor brought against the bank was not an action for redemption. It was an action of detinue. The writ was issued in haste. But the statement of claim was not delivered until the 14th of April. It is certainly a singular document. It does not refer to the mortgage of February, 1886, or notice the fact that the deeds were deposited as a security. It simply states that the bank on the 21st of February, 1887, detained, and had always since such time detained, from the plaintiff his title deeds. It specifies the deeds, and states that by reason of such detention the plaintiff had suffered damage as follows: "He was rendered unable to procure a loan of £600 from Annie Pye . . . and unable to pay his workmen in his business of coach-builder, and was compelled to discharge some of his said workmen, and was rendered unable to meet his liabilities in his said business, and was sued in respect thereof, and his credit was injured and his trade diminished, and his said business was otherwise injured." Then it claims a return of the deeds, or £1000 for their value, and £2000 for their detention.

The defence was delivered on the 29th of April. It is [\*280] equally \*remarkable. For some unexplained reason, the bank also abstained from referring to the mortgage of February, 1886, which apparently in any view would have been an answer to the action as framed. But they did plead that before the alleged detention the plaintiff deposited the said deeds with

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them to secure the repayment of £100, and that the said sum was due at the time of the detention, and still remained due. Without admitting liability they brought into Court £50 and one shilling, and they delivered a counter-claim for money due to them.

In reply, the plaintiff admitted the deposit by way of security, as well as the fact that the sum intended to be secured was due at the time of the detention, and still remained due. He then stated the tender on the 21st of February, and its refusal.

Instead of applying to have the question raised by the pleadings disposed of at once, and the action stayed or dismissed, the bank allowed the action to be set down for trial. It came on to be tried on the 20th of July, 1887, before Mr. Justice HOLROYD and a jury. In addition to proof of the facts already stated evidence of a somewhat loose and unsatisfactory description was offered, with the view of proving the special damages alleged in the statement of claim. This evidence was objected to, on the ground that the damages claimed were too remote. The learned judge admitted the evidence, but reserved the question of its admissibility for the consideration of the full Court. No evidence was given on the part of the defence. The jury estimated the value of the property at £700. They gave £1500 damages for detention, and they found that there was due to the bank under the counter-claim the sum of £284 2s. 7d., which was afterwards reduced by consent to £202 1s.

The question reserved came on to be argued before the full Court on the 10th of August, 1887, when it was held that the evidence objected to was admissible.

On the 26th of August, 1887, on motion for judgment, the Court adjudged:—

1. That the plaintiff recover against the defendant £1500 on his claim.

2. That the defendant recover against the plaintiff the sum of £202 1s. on the counter-claim.

\* Provision was made for set-off and payment of the [\*281] balance, and the bank renouncing any further claim on the deeds, the subject of the action, they were to be delivered up to the plaintiff. The bank was ordered to pay the costs of the action and the costs of the argument before the full Court, after deducting the costs of the counter-claim.

On the 2nd of November, 1887, the bank moved the full Court for an order to set aside the verdict for the plaintiff, on the grounds that it was against the weight of evidence, that the damages were excessive, and that evidence had been improperly admitted. The only ground argued was that the damages were excessive. The Court ordered that the verdict should be affirmed, and that the motion for a new trial should be dismissed, with costs.

The bank has appealed to Her Majesty in council from the two orders of the full Court and the judgment of the 26th of August, 1887.

The whole matter is therefore open with this exception, that the bank cannot now be permitted to rely upon the legal mortgage of the 22nd of February, 1886, although it was put in evidence at the trial by the plaintiff. They deliberately elected to treat the case as if they had only an equitable mortgage by deposit, and the appeal must be decided on that footing.

The learned counsel for the appellants dwelt with much force on the extravagance of a verdict which even their opponents described as liberal, and on the novel dangers to which mortgagees would be exposed if such a verdict were upheld. They contended too that no damages, or at any rate no substantial damages, were due either in fact or in law. These contentions and the arguments by which they were supported would be worthy of careful attention if it were necessary to consider them. But in their Lordships' opinion there is a more serious question which must be disposed of in the first instance. That question is raised on the pleadings, though the attention of the Court below was apparently not called to it. The appellants are to blame as well as the respondent for the way in which the litigation was conducted. But their Lordships are not at liberty to countenance a departure from settled principles, because in the conduct of the action both parties have chosen to ignore them.

[\*282] \*The question that suggests itself is, can such an action as this be maintained? It was treated by the learned counsel for the respondent, and indeed by the learned counsel for the appellants during a great part of their argument, as an action for damages occasioned by a wrongful act arising out of breach of contract. What is the wrongful act? And what is the breach of contract? Their Lordships have not had the advantage of seeing a note of the summing-up. But in the full Court the learned judge

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who tried the case states his view as follows: "In my opinion there was a contract here to deliver up the deeds on payment of a certain sum of money. That was broken when the money was tendered and ought to have been accepted. Then the bank was in the same position as if it had actually taken the money and then refused to deliver up the deeds. That was a wrongful detention of another man's property, and therefore a tort." The bank was no doubt bound to deliver up the deeds on payment of the sum secured, with interest and costs, if any. But, in their Lordships' opinion, there is no foundation for the proposition that a tender properly made and improperly rejected is equivalent to payment in the case of a mortgage. The proposition seems to be founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law, that special property is determined if a proper tender is made and refused. The pledgee then becomes a wrongdoer. The pledgor can at once recover the chattel by action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem, must do equity and pay principal, interest, and costs before he can recover the property which at law is not his. So it is in the case of an equitable mortgage. It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a court of equity would undoubtedly have restrained \*the legal owner of the property [\*283] from recovering his title deeds at law so long as the charge continued, and now when law and equity are both administered by the same Court if there be any conflict the rules of equity must prevail. In *Postlethwaite v. Blythe*, 2 Sw. 256, where property had been conveyed to secure a debt of a comparatively small amount, the LORD CHANCELLOR refused to direct a release upon payment into Court of the largest sum to which the debt would in probability amount. Lord ELDON said: "I take it to be contrary to the whole course of proceeding in this Court to compel a



creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment." To some extent the strictness of that rule has been relaxed in modern times, and it is now the practice, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into Court a stated sum sufficient to cover the amount of principal and interest and the probable costs of the suit, and then upon payment into Court, but not till then, the mortgagee is required by the order to deliver up the title deeds. It would be contrary to equity to order a mortgagee to deliver up the title deeds of property on which he has a security upon any other terms. A mortgagor has no right even to see the deeds before payment. It is no hardship upon the mortgagor, for if he has made a proper tender he can always obtain his deeds on a summary application on the terms of substituting for the security a sum of money equal to the amount secured, with a proper margin. A form of order adapted to such a case is to be found in *Seton on Decrees*, 4th ed. p. 1040.

No doubt it is the duty of a mortgagee, on proper notice, or without notice in a case where notice is not required, to accept a proper tender. No doubt that duty is founded upon contract. But there are other terms of the contract of at least equal importance. A court of equity can take all the circumstances of the case into consideration, and do complete justice between the parties, however complicated their relations may be. That is not within the province or power of a jury. If a mortgagee rejects [\* 284] a tender he rejects it at his own risk, and in an \* action for redemption he may be refused his costs in consequence, or may even be ordered to pay costs. Further a proper tender will stop the running of interest if the mortgagor keeps the money ready to pay over to the mortgagee: *Gyles v. Hall*, 2 P. Wms. 377. But there is no authority for saying that refusal to accept a proper tender is a breach of contract, for which an action at law will lie.

The learned counsel for the respondent were invited to produce some authority for such an action. One case, and one case only, was cited as a precedent. In *Chilton v. Carrington*, 15 C. B. 95, 730; 16 C. B. 206, the experiment was tried once and again. But the result of two actions in that case, so far as they are reported, affords but little encouragement for a repetition of the experiment.

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In *Chilton v. Carrington*, the assignee of a bankrupt publican sought to recover the title deeds of a public-house, which had been deposited with the defendants to secure a sum of £150. The action was brought after tender. The plaintiff sued for detention of the deeds, which were described in the declaration as "goods and chattels," and for damages. The defendants did not put in an equitable plea, but their case was that the deposit was intended to secure an account for beer as well as the £150. That question was tried on demurrer. It was held that the deposit was only a security for the £150. The parties then went to trial, and there being no equitable defence, they agreed that the jury should find the damages for the detention, and that they should not be required to assess the value of the so-called goods and chattels. Upon this arrangement the jury found a verdict for £60 damages. The plaintiff then applied to the judge in chambers for delivery up of the deeds. The defendants urged that they ought not to be required to deliver up the deeds before payment. The learned judge, however, made the order. The defendants then applied to the full Court to set aside the order, and argued that, according to the settled principles of equity, they could not be required to part with their security until they were paid. The learned judges were puzzled by the course which the parties had taken. In the course of the argument, addressing the counsel for the \*defendants, Mr. Justice WILLIAMS observed with perfect [\*285] accuracy, "If you are right the plaintiff ought not to have succeeded in the action." Ultimately the Court got over the difficulty, by setting aside the order in chambers, on the ground that by arrangement between the parties the jury had been discharged from finding the value of the deeds detained. As the result of that action the plaintiff was no nearer getting back his deeds. However, he still contended that, having made a proper tender and that tender having been refused, he was entitled to have his deeds without payment of the money. So he brought another action of detinue. On this occasion the defendants were better advised, and they put in a plea by way of equitable defence that the deeds were deposited to secure £150, and that that sum remained unpaid. On argument the Court allowed the plea to be put in, and nothing further seems to have been heard of the action.

That case, so far from being an authority in favour of the respondent, is really an authority against him.

Their Lordships are therefore of opinion that it is clear, both on principle and authority, that such an action as the present cannot be maintained. Under these circumstances, their Lordships do not propose to give any opinion as to the admissibility of the evidence objected to or as to the amount of the damages recovered. Those questions, in the view of their Lordships, cannot arise.

The proper order will be to dismiss the action, to allow the verdict on the counter-claim as reduced by consent to stand, and to direct payment to the appellants of the reduced amount, together with interest and the costs of the counter-claim.

As to the costs of the action, having regard to the way in which the bank has acted in the conduct of the litigation, their Lordships have come to the conclusion that there ought to be no costs on either side, and there will be no costs of the appeal.

Their Lordships will humbly advise Her Majesty accordingly.

#### ENGLISH NOTES.

Cases of this class are frequently cited as illustrations of the maxim that where equities are equal, law will prevail. The cases are, so far as practicable, arranged here in order of date.

In *Head v. Egerton* (1734), 3 P. Wms. 280, case 69: — A. mortgaged his lands to B., but B., through his confidence in A., who stated that his deeds were in the country and promised to deliver them, did not insist upon the immediate delivery of the title deeds. A. then executed a legal mortgage of the same lands to C., and deposited the title deeds. It was held that though B. had priority over C., the latter would not be compelled to deliver up the title deeds, unless his mortgage was paid off. In *Hooper v. Ramsbottom* (1815), 6 Taunt. 12, A. sold his leasehold to B., but the conveyance was delivered as an escrow till the purchase money was paid. A. deposited the title deeds with C. as security for an advance. B., on tender of the purchase money, was held entitled to recover the title deeds from C.

In *Harrington v. Price* (1832), 3 B. & Ad. 170, an estate was conveyed in 1803 by J. B. to W. H., who in (1812) conveyed it to A. H., who sold it in 1826 to the plaintiff. The original vendor did not deliver up the title deeds. In 1824, he was sued by the then owner of the estate for the deeds, and a verdict was recovered against him, but the judgment was not docketed. He absconded, and in 1825 obtained a sum of money, as on a mortgage of the estate, from one of the defendants with whom he deposited the title deeds. On trover

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brought in 1829 by a party claiming through the conveyance to W. H. the mortgagee was ordered to deliver up the title deeds without even a tender of the mortgage money.

In *Whitbread v. Jordan* (1835), 1 Y. & C. 303, the plaintiff lent £2000 on the security of a deposit of title deeds (containing copies of the Court rolls) to certain copyholds. J. subsequently, on the security of a conditional surrender of the copyholds, obtained a loan from the defendant, who did not insist upon the production and inspection by J. of his copies of the Court roll. It appeared that the defendant had accepted J.'s explanation that he had mislaid the copies of Court roll and satisfied himself with a statement by the steward that the title was unencumbered. It also appeared that the defendant, who was a spirit merchant, was aware that J., who was a publican, was indebted to the plaintiff, who was a brewer; and there was evidence of a general practice for persons in J.'s situation when in distress for money to deposit their titles as security with their brewers or spirit merchants. It was held by ALDERSON, B., that the plaintiff had a good equitable title by deposit of the deeds, and that this equity prevailed against the defendant, although a purchaser for value with a legal title, on the ground that his gross negligence fixed him with constructive notice.

In *Newton v. Beck* (1858), 3 H. & N. 220, 27 L. J. Ex. 272, referred to in the principal case of *Manners v. Mew*, the facts were as follows: A. having purchased an estate from T., mortgaged the estate in fee simple to B., the mortgage purporting to grant the title deeds. He deposited with B. the genuine conveyance to T. and a counterfeit of the conveyance of the estate from T. to himself. Subsequently A. deposited with C. as security for an advance the genuine deed of conveyance of the estate from T. to himself. It was held that B. could recover this deed from C.

In *Rice v. Rice* (1853), 2 Drew, 73 (No. 6 of "Equitable Title," 10 R. C.), A., B., and C. sold their estate to D., and acknowledged the receipt of the purchase money. As a matter of fact, A. was paid his share, but B. and C. were not. They, however, allowed D. to possess himself of the title deeds and of the conveyance. D. deposited these with his bankers as security for an advance. The bankers were held entitled to priority, as having a better equity than B. and C., who had armed D. with the power of dealing with the estate as absolute owner.

In *Roberts v. Croft* (1858), 24 Beav. 223, affirmed 2 De G. & J. 1, A. deposited title deeds of some property with B. for an advance, but kept the deed by which the lands had been conveyed to A. He signed a memorandum of deposit which represented that these were all the deeds. A. then deposited the conveyance and duplicates of some of the earlier deeds with C. for an advance. B. was held entitled to prevail over C.



Either of the transactions by itself created a good equitable mortgage, and there was no such gross negligence on the part of B. as to displace her prior equity.

In *Hopgood v. Ernest* (1865), 3 De G., J. & Sm. 116, the plaintiff agreed with E. to advance him money on mortgage. The plaintiff's solicitor prepared the deed and sent it to A., who was E.'s solicitor, for execution. A., who was also the solicitor of B., sent by his clerk the plaintiff's mortgage deed and also a mortgage deed of the same property from E. to B. for execution by E. E. signed the plaintiff's deed before B.'s deed. The title deeds were handed to the plaintiff, who advanced the money. The plaintiff was held entitled to hold the title deeds as against B.

A., the trustee of a lease, deposited it with his bankers as security for an advance. On becoming aware of the trust, the banker procured a formal mortgage. The beneficiaries were held entitled to priority. For A. could not in equity create an interest which he did not possess, and the bankers having no equity, could not when they discovered their position acquire any by obtaining the legal estate. *Baile v. M'Kewan* (1866), 35 Beav. 177.

In *Hooper v. Gumm* (Ch. Ap. 1867) L. R. 2 Ch. 284, 36 L. J. Ch. 605, the legal mortgagee of a ship concealed his mortgage for the purpose of facilitating a sale by the mortgagor. He was not allowed to prevail against the person who purchased the ship from the mortgagor without notice of the mortgage.

A. having covenanted to purchase an advowson, borrowed from B. £2500, and covenanted with him to pay for and convey the advowson to him in six months. A. completed the purchase, but did not convey the advowson to B. He then deposited the title deeds with C., as security for an advance of £1000. In a suit commenced by B. against C., the latter was allowed to prevail. *Loyard v. Maud* (1867), L. R. 4 Eq. 397. So in *Garnham v. Skipper* (1886) 55 L. J. Ch. 263. 53 L. T. 940, 34 W. R. 135.

Equitable mortgagees by deposit of title deeds took from the mortgagor at the same time a conveyance of the legal estate in the mortgaged property and other property. On being paid off, they gave up the title deeds but kept the conveyance. A subsequent mortgagee of the same property from the mortgagor was held entitled to have a reconveyance of the property from the former mortgagees. *Young v. Whitechurch and Ellesmere Banking Company* (1868), 37 L. J. Ch. 186.

J. T. was, as devisee under his father's will, equitable owner in fee simple of an undivided moiety of land at W. The other moiety was by the same will devised to W. T., to whom, on the testator's death, the legal estate in the entirety descended. In 1812, J. T. by deed charged

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his moiety with an annuity of £50. In 1813, J. T. by his marriage settlement charged other lands with a sum of money to be raised at his death. In 1823, he purchased the legal fee simple of the other moiety of the land at W. In 1825, he, in exercise of a power in the settlement, substituted the land at W. for the land comprised in the settlement. In 1830 he mortgaged his original moiety of the land at W., and deposited with the mortgagee the deed of 1812 and an earlier deed. In 1832, the mortgagee became aware of the settlement. In 1834, the mortgagee took possession of the mortgaged property, and in 1835 purchased the annuity of £50. The annuitant died in 1837. J. T. died in 1866. It was held that the charge under the settlement was prior to the mortgage, and that the mere custody of the title deeds did not confer any priority on the mortgagee. The Court refused to order delivery up of these deeds, but directed them to be produced for the purposes of sale decreed in the suit. *Thorpe v. Houldsworth* (1869), L. R. 7 Eq. 139, 38 L. J. Ch. 194.

R., who was a sole trustee, sold out trust stock. He afterwards advanced a sum of money to one of the beneficiaries for the purchase of an estate, which was, on the purchase being completed, mortgaged to R. for the advance. R. afterwards deposited the deeds with his bankers to secure a debt due from himself. R. admitted that the deeds related to trust property. Lord ROMILLY, M. R., held that the bank, having a mere equitable title derived from a person who had no interest in equity, were not entitled to hold the deeds against the right of the beneficiaries under the trust. The Court of Appeal reversed the decision on the ground that notwithstanding the admission of R. they were not satisfied that the property was trust property; but they intimated that they did not dissent from the opinion expressed by Lord ROMILLY on the question of law. *Newton v. Newton* (1869), L. R. 4 Ch. 143, 38 L. J. Ch. 145.

*Pearce v. Morris* (1870), L. R. 5 Ch. 227, 39 L. J. Ch. 342, decides that a mortgagee receiving the principal debt, interest, and costs from a person interested in the equity of redemption is bound to reconvey the estate to that person subject to the equities (if any) of other persons interested.

The mortgagee has no right to detain the title deeds after his mortgage has been paid off. The mere fact that the sureties for the mortgagor who have paid the debt, may have an equity of indemnity will not alter the case, if the sureties, being made parties to the action, do not assert any claim. *Crickmore v. Freeston* (1871), 40 L. J. Ch. 137.

In *Pilcher v. Rawlins* (1872), L. R. 7 Ch. 259, 41 L. J. Ch. 485, 25 L. T. 921, 20 W. R. 281, P. and her co-trustees advanced trust money to A. on a legal mortgage of land, the mortgage reciting

the trust. By collusion with P., who was surviving trustee, A. obtained the title deeds and also a reconveyance of the legal estate. Suppressing the mortgage and the reconveyance, the land was, with the connivance of P., conveyed by A. as under his original title to C. by way of mortgage, and the money obtained in the transaction was divided between A. and P., the latter applying his share to his own use. The question arose between the right of C. and the beneficiaries under the trust who had been defrauded of their money, and the Appellate Court — reversing the judgment of ROMILLY, M. R., who held that C. had constructive notice of the facts which would have appeared on the deeds forming the complete chain of legal title if they had been disclosed — decided that C.'s mortgage had priority over the beneficiaries interested in the former mortgage.

In *Marfield v. Burton* (1874), L. R. 17 Eq. 15, 43 L. J. Ch. 46, 29 L. T. 571, 22 W. R. 148. A. deposited his title deeds with a banker as security for an advance, and undertook to convey the legal estate when necessary. Subsequently on his marriage he settled the land as if unencumbered, on the usual trusts. The solicitor to the wife did not make sufficient inquiries for the title deeds. It was held that this negligence deprived the wife of her right to priority as a purchaser for value.

*Heath v. Crealock* (1875), L. R. 10 Ch. 22, 44 L. J. Ch. 157, 31 L. T. 650, 23 W. R. 95. cited and approved in the principal case of *Manners v. Mew*, was followed in *Waldy v. Gray* (1875), L. R. 20 Eq. 238, 44 L. J. Ch. 394, 32 L. T. 531, 23 W. R. 676, where through the fraud of the solicitor, who was also a trustee, the title deeds were delivered to the mortgagor. The mortgagor obtained an advance from his bankers by deposit of those deeds. It was held that the bankers were entitled to retain the deeds.

A mortgagee or the transferee of a mortgage, who is being paid off, although entitled to keep a fair copy of the draft deed for his own protection until the transaction is completed, has no right to keep copies of the mortgage deed or the deed of transfer after he is paid off. Any copies which he has must be delivered up to the mortgagor. *In re Wade and Thomas* (1881), 17 Ch. D. 348, 50 L. J. Ch. 601, 44 L. T. 599, 29 W. R. 625.

In 1874, A. as lessee under a fictitious lease from a fictitious freeholder mortgaged it by sub-lease to B. Shortly afterwards, C. as another fictitious lessee of the same property from another fictitious freeholder sub-demised it by way of mortgage which became vested in D. A. and C. were both confederates in these frauds with E., a solicitor who in 1873 had become transferee of genuine mortgages on the freehold, which he submortgaged. The property was sold by the sub-

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mortgagee in 1875 to a trustee for C., and in 1876 the trustee conveyed the property to C., who was a trustee for E. In 1877, C., professing to be beneficially entitled, obtained an advance from F. on deposit of the genuine title deeds. This mortgage was confirmed by E., the equitable owner, and a further advance was made to E. It was held that F., as holder of the genuine title deeds, was the only encumbrancer on the land. *Keate v. Phillips* (1881), 18 Ch. D. 560, 50 L. J. Ch. 664, 44 L. T. 731, 29 W. R. 710.

The case of *In re Cooper*, *Cooper v. Vesey* (C. A. 1882), 20 Ch. D. 611, 51 L. J. Ch. 862, 47 L. T. 89, 30 W. R. 648, cited and relied upon in the principal case of *Manners v. Mew* was decided on the following facts: A. (who bore the same name as his father), was the son, the heir at law, and one of the executors of his father's will. He, without the knowledge of the other executors, executed a legal mortgage of some property comprised in the will, and applied the proceeds to his own purposes. He represented himself, and was believed by the mortgagees to be, the absolute owner of the properties. In an action against the mortgagees by the other executors, Mr. Justice KAY, who tried the case, found as a fact that A., in executing the deed, had personated his father; and the Court of Appeal being of opinion that that finding was supported by the evidence, and, therefore, that the deeds were forgeries, held that the mortgagees acquired nothing beyond A.'s beneficial interest under the will, and must deliver up the title deeds to the executors of the will.

An equitable mortgagee by deposit of the title deeds cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deeds. The donee cannot retain the deeds as mortgagee. *In re Richardson, Skillico v. Hobson* (C. A. 1885), 30 Ch. D. 396, 55 L. J. Ch. 741, 53 L. T. 746, 34 W. R. 286.

The rule that the Court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence does not apply as between two equitable incumbrancers. For instance, if the mortgagee in possession of the title deeds, being informed of certain facts by the mortgagor, omits to make reasonable inquiries which would have led to the detection of a fraud committed by the mortgagor on prior equitable incumbrancers, he will be postponed to these latter. *National Provincial Bank of England v. Jackson* (C. A. 1886), 33 Ch. D. 1, 55 L. T. 458, 34 W. R. 597; or if a prior equitable mortgagee is negligent in obtaining possession of the title deeds, he will be postponed to a subsequent equitable mortgagee. *Farrand v. Yorkshire Banking Company* (1889), 40 Ch. D. 182, 58 L. J. Ch. 238, 60 L. T. 669, 37 W. R. 318. Of course, if the prior equitable mortgagee was not negligent, he will not be postponed. *Dixon v. Muckleston* (1873), L. R., 8 Ch. 155, 42 L. J. Ch. 210, 27 L. T.



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804, 21 W. R. 178; *Flinn v. Pountain* (1889), 58 L. J. Ch. 389, 60 L. T. 484, 37 W. R. 443. It has been held not to be negligence in the mortgagee of a builder's interest under a building agreement, that he has not given notice to the freeholder; so that such a mortgagee was held entitled to priority to an equitable mortgagee by deposit of the leases; *Union Bank of London v. Kent* (C. A. 1888), 39 Ch. D. 238, 57 L. J. Ch. 1022, 59 L. T. 714, 37 W. R. 364. And where a solicitor represented to a client that he had invested his money in a particular mortgage, being in fact a mortgage which stood in his own name, the title of the client was held to have priority to that of a subsequent equitable mortgagee by deposit of the deeds — the client being entitled to rely on the representation of his solicitors, and being therefore not chargeable with any negligence. *In re Richards, Humber v. Richards* (1890), 45 Ch. D. 589, 59 L. J. Ch. 728, 63 L. T. 451. See also *Rice v. Rice* and *Roberts v. Craft*, p. 705, *supra*.

A., the purchaser of an equity of redemption in leaseholds, had the equity assigned to B. as trustee for himself, but the deed of assignment did not disclose the trust, so that B. appeared to be the absolute owner. B. obtained an advance from C. by demise of the equity of redemption and deposit of the deed of assignment. B. was the confidential clerk of A., and had control of A.'s safe in which the deed of assignment was kept. In an action by A. for a declaration that C. had no interest in the mortgaged property and delivery up of the deed of assignment, it was held that A. had not, by allowing B. to have the custody of the deed of assignment, been so negligent as to deprive him of his prior equitable title, and that therefore he had a right to the title deeds. *Carritt v. The Real and Personal Advance Company* (1889), 42 Ch. D. 263, 58 L. J. Ch. 688, 61 L. T. 163, 37 W. R. 677. Mr. Justice CHITTY held that the ordinary recital that A., B., and C., who in fact are trustees, are entitled to the money on a joint account cannot be relied on by a purchaser as a representation that the money is not trust money.

W. sold and conveyed to T. property which was comprised in a legal mortgage (vested in X.) of a larger estate — though at the time of the sale the title deeds of the property sold were in W.'s possession and the existence of this outstanding mortgage was not adverted to. On completion of the sale these title deeds were delivered to T. Subsequently, T. conveyed the property to A. by way of mortgage for an advance, but kept the title deeds and delivered with his conveyance a forged title deed representing the property to have been conveyed to him by one S., who was known to be an owner of a large estate in the neighbourhood. T. then obtained from B. another loan on a mortgage of the property and delivery of the genuine title deeds. B. was ignorant of the outstanding mortgage, and of the

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advance made by A.; but on discovering the truth, induced X. to reconvey the legal estate by a voluntary deed to W. free from his mortgage — other property comprised in the mortgage being sufficient security — on the express condition that W. should reconvey the property to B. W. did so, though he was aware of A.'s charge. It was held that B. had done nothing to disentitle him to the advantage of the legal estate. *Taylor v. Russell* (1892), 1892, A. C. 244, 61 L. J. Ch. 657, 66 L. T. 565 (No. 9 of "Equitable Title," 10 R. C.).

A mortgagee of leaseholds appointed his widow and son as executors, gave his widow a life interest in his property with remainder to the son, and he gave his trust and mortgage estates to them as joint tenants. The widow took possession of the title deeds, including those of a mortgage of some property. These she handed over to the mortgagor on some representations made by him. The mortgagor obtained an advance on the security of the title deeds from his bank. The widow and the mortgagor both died. In an action for custody of the deeds, it was held that the son was not affected by the negligence of the widow, and was therefore entitled to the deeds. The learned judge, STIRLING, J. observed that, if his jurisdiction had been equitable merely, he could not have deprived the bank of the deeds on the faith of which their money was honestly lent. But the Court had, since the Judicature Acts, power to decide on legal as well as on equitable claims; and he cited *In re Cooper*, *Cooper v. Vesey* (p. 709, *supra*), as a case in which a mortgagee had been ordered to deliver up deeds at the instance of a legal owner. In this case the son as surviving executor and legal owner of the mortgaged property had a title to the deeds to which the bank had no answer. *In re Ingham*, *Jones v. Ingham* (1893), 1893, 1 Ch. 352, 62 L. J. Ch. 100, 68 L. T. 152, 41 W. R. 235.

When the mortgagee becomes entitled to exercise a power of sale under the Conveyancing Act, 1881, he acquires, under section 21 (7) of that Act, a right to "demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him." It may be assumed that this refers to the right which the purchaser would have on completion of his purchase. Then the equity of redemption would be extinguished, and the mortgagor, having no interest, would have no right to any deeds. Consequently the effect of the section seems to be that the mortgagee immediately on his power of sale becoming exercisable, is entitled to recover from the mortgagor any deeds in his hands.

SECTION V. — *Production of Deeds.*No. 17. — LADY SHAFTESBURY *c.* ARROWSMITH.

(CH. 1798.)

No. 18. — BOLTON *c.* CORPORATION OF LIVERPOOL.

(CH. 1833.)

## RULE.

A PARTY is entitled to the production of deeds sustaining his own title affirmatively, whether he and his adversary claim under a common title or not. He is not entitled to the production of those which are not immediately connected with the support of his own title, and which form part of his adversary's, or would defeat his title by entitling his adversary.

The heir at law claims by a title paramount, and, as a corollary to the above rule, when suing in that capacity, cannot call for a general inspection of the deeds in the possession of the devisee.

**Lady Shaftesbury v. Arrowsmith.**

4 Ves. 66-72 (s. c. 4 R. R. 181).

*Deeds. — Right to Inspection. — Heir-at-Law.*

[66] An heir at law has no equity except to remove incumbrances in the way of his legal right: he cannot call for an inspection of deeds in the possession of the devisees.

Bill by heir in tail against devisees: on motion an inspection was ordered of all deeds of settlement, admitted to be in the possession of the defendants, creating estates in tail general; but no farther.

Sir John Webb, by his will, gave all his estates to Arrowsmith and Butler in trust.

After a suit had been instituted for the purpose of establishing the will, this bill was filed against the trustees; stating, that the plaintiff is heir at law and customary heir of the

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\* testator. The bill also stated, that the plaintiff is heir of [\* 67] the body of the testator; and that she is totally ignorant, whether she is or is not entitled to any and which of the estates devised; that the estates are in the possession of the defendants; that there were several settlements; and that it is impossible for the heir to know her title without an inspection of the deeds. The bill therefore prayed, that the defendants may be decreed to produce and show to the plaintiff all the several title deeds and writings which shall appear to be in their possession; and, if it shall appear, that the testator was not seised in fee, or if any of the estates were copyhold, not duly surrendered to the use of the will, or if the will was not duly executed, or if it shall not appear, that the testator was of sound mind at the time of execution, or if any fraud was practised, then that the several title deeds, settlements, and instruments in writing, relating to such of the said estates as the plaintiff shall appear entitled to, either as heir-at-law, customary heir, or heir of the body, may be decreed to be delivered up to the plaintiff.

The defendants, by way of schedule to their answer, set forth an abstract of several settlements in their possession.

A motion was made, on the part of the plaintiff, for an order, that the deeds might be produced for her inspection; and that they might be deposited in the master's office.

Mr. Mansfield, Mr. Sutton, and Mr. Cox, for the motion. — In *Bettison v. Furrington*, 3 P. Will. 363, the party was not heir, except as to an honour descending upon him; and it was admitted there, that it would be done at the hearing. So in the *Earl of Suffolk v. Howard*, 2 P. Will. 176, which was a bill on the part of the heir, it is plainly implied, that the question was not, whether there was to be a production of the deeds, but whether it could be done upon motion, or was to wait for the decree. The heir, without an inspection, cannot tell what is the title of the ancestor; whether in fee or in tail. He must assume the title of the ancestor to be a seisin in fee. I believe Lord HARDWICKE considered the rule established, that the heir has a right, upon filing a bill against the devisee, to have the title deeds produced; and Lord MANSFIELD frequently spoke of this right in the heir. *Barton v. Neville*, 2 Cox, 242, before Lord THURLOW, is directly against the cases I have mentioned; in the last of which, not only an inspection of the deeds creating an entail, or making



a tenant to the præcipe was granted, but of all deeds [\*68] \*and writings. The claim as heir in tail is exactly according to the cases in *Peere Williams*. Lord THURLOW thought the heir entitled to the deeds creating the entail and the prior title deeds.

In this case six or seven family settlements of these estates have been made from time to time. They are stated in the abstract; but the plaintiff has not seen the particulars of them, nor the deeds making tenants to the præcipe. She has a right to all those. The Court always indulges the heir with an opportunity of knowing how he is disinherited. The heir is always under this difficulty; that not having the possession of the deeds, he cannot point out those under which he has an interest. Is there any other mode of ascertaining that than by the production of all? If it is once ascertained that the deviser was seised in fee, certainly the heir can only ask, whether the will is effectual; but in this case a title in tail is asserted.

Attorney-General, Solicitor-General, and Mr. Thomson, for the defendants. — This application involves a proposition of great consequence; so much so, that perhaps the Court would hesitate to grant it on motion. The bill is very peculiar; for first it considers the plaintiff as heir-at-law; then states a possibility that she may be heir in tail; and in that mixed character she calls for the relief to which she may be entitled, if she is proved heir in tail: but she does not assert that positively, or pray a discovery as to that. As heir-at-law she might bring an ejectment; and if there was any difficulty in her way, she would be entitled to remove it, and to have a discovery. The bill therefore is not properly framed in that character. As heir in tail she states no entail. She might say, as they have got the title deeds, she has a right to discover whether or not there was an entail, under which she could claim; they might answer, that they could not find it; or they might refer to it so as to entitle her to the production: but the bill is not framed with that view. It is only a loose allegation, that she does not know but that she may be entitled in tail. It is necessary to have a degree of certainty in the bill, that the defendants may know what defence to make. Suppose an entail was stated, the defendants might plead the deeds of the recovery; but if the entail is not distinctly stated they are ousted of that defence. The plaintiff merely states, in

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general terms, that she is heir-at-law; and also, that she is heir in tail, without setting forth any deed, or referring to any specific act to establish that title. As the heir is a female, \*it might happen, that if she could show an entail, it [\*69] might not give her a title, but without giving any interest to her it might operate directly against the devisees of her ancestor. In the cases cited a special deed of entail is stated. In *Dormer v. Fortescue*, 2 Atk. 282; 3 Atk. 124, and *Pincke v. Thornycroft*, before your Lordship, Lord THURLOW, and the House of Lords, 1 Bro. C. C. 289; Cruise, 174, the title was as heir general; and it was held, that though the heir has an equity beyond any one else, yet he must admit, that the possession of his ancestor is *primâ facie* evidence of seisin in fee; and he must frame his bill so as to satisfy the Court, that if he brings an ejectment upon that sort of evidence, that his ancestor was seised in fee, he may meet with some impediment in the application of that evidence at law, which in equity he has a right to remove, in order to try it at law. It was pretended in that case, that a mortgage term would be set up against the ejectment.

The heir in tail is in a different situation. He has a right to inspect, and be enabled to produce the deed creating the entail; but then the moment he proves himself heir of the body of the person last seised, he puts it upon the other party to meet him at law upon that title. The heir in tail has no other right than to see the deed creating the entail and the prior deeds, but not to call for the deeds by which that entail is defeated; which is the point to be tried at law. That was the principle of *Burton v. Neville*. In *Bettison v. Farrington* it was an order of course to set forth the deeds referred to in the answer. In the other case in *Peere Williams* the party could not make *profert* of the deed in a court of law; and he had a right to have that deed produced by the decree of a Court of Equity. The Court said, that as the other party informed the Court how the entail had been barred, he must show the deed, that the Court may determine whether it has the consequence they attribute to it: but they might have refused to produce any except the deed of entail and the prior deeds. In a late case in the Court of Exchequer the bill was filed by an heir in tail, praying a discovery of all the deeds. A demurrer was put in to so much of the bill as related to any deeds subsequent to the deed creating the estate-tail; and the demurrer was allowed.

*Stapleton v. Sherrard*, and *Sherbone v. Clerk*, 1 Vern. 212, 273, perfectly warrant that decision. A person desiring the [\*70] production of \*deeds must show a title to that production.

For that purpose he must show some claim under the deed, unless the object is to set aside the deed as fraudulent; the claim being paramount to the deed. Such a general right in the heir would be very mischievous. There is no case in which a loose bill like this has had that effect. If there are circumstances, if a term or a mortgage is stated to be in the way, he has a right to a discovery as to that, but to that only. The defendant must state by his answer, whether there are such incumbrances, or not. The deed of entail is distinctly stated in the two cases in *Peere Williams*. In one there is a *quære* by the reporter, whether a bare reference to a deed will make it part of the answer. In the other the Court appears to have gone rather too far, upon the ground that it was a hard case, and on account of the complete disinherison of the earl, who had not the means of pursuing the suit. It is not noticed in later cases as having been urged; and it ought not to be much cited.

Reply. The plaintiff says she is heir in tail; and if any entails were created, which are not barred, she is entitled under them. What more can she say, when all the deeds are in the hands of the defendants; which is admitted? What more can she state than that she is ignorant, whether the deviser was entitled in fee, and had power to dispose? The answer refers to a great many deeds, without stating the contents: but apparently there are many settlements creating entails. It is admitted that the plaintiff has a right to the inspection of deeds creating entails: as to anything else, *Burton v. Neville* is an authority against it: but it stands in opposition to the cases in *Peere Williams*. It is true, in both those cases an entail is stated: but the order appears to go far beyond the production of those deeds; and goes clearly to the deed creating the tenant to the *præcipe*; and the rest only refers to the time when the production is to take place.

LORD CHANCELLOR (LORD LOUGHBOROUGH). It would be a very delicate point to order a general inspection into all deeds and settlements on behalf of a person claiming in the mere character of heir-at-law. I do not find any spark of equity, upon which that application could be made to this Court and supported. The title of the heir is a plain one; and it is a legal title. All the family-deeds

together would not make his title better or worse. If he cannot set aside the will, he has nothing to do with the deeds. He  
 \* must make out his title at law, unless there are incum- [\*71]  
 brances standing in the way, which this Court would  
 remove in order to his asserting his legal right. There the principle of equity interferes. The cases in *Peere Williams* are those of an heir in tail. A will is no answer to an heir in tail: a will established is an answer to an heir-at-law. An heir in tail has beyond the general right such an interest in the deed creating the entail, that the Court, as against the person holding back that deed, would compel the production of it. His right also is upon a very plain ground: to remove an impediment preventing the trial of a legal right. In the two particular cases cited (I do not go quite along with the reasoning in either of them), the Court did no more than what according to the state of the case was perfectly innocent, and led to no mischievous consequence: for the production of the deed creating the entail, where the party could not get at it without the aid of this Court, I have already stated it is in the power of the Court to order as to what more was done, he being tenant in tail, and that admitted, the Court by enabling him to look at the deed to make the tenant to the *præcipe*, only put him in the situation he would be in at law upon an ejectment. Where the tenant in tail has possession of the deed, that makes the entail, and can prove the heirship in tail, it is put to them to produce the recovery. All the proceedings of necessity appear upon the trial, and must be brought forth. They cannot set out the judgment in the recovery, but must set out the whole proceedings. I remember a very long title upon a special verdict. The consequence was, that it was enormously swelled by setting out one or two recoveries. A proposition was made to the Court, whether it would not be better to state the fact, that the recovery was suffered: but upon consideration the Court thought it quite necessary to show upon the record, that it was well suffered. The Court therefore in those cases gave him no discovery, that in the course of his legal pursuit he would not come at; and the only advantage was to give him a little time to consider, whether it would be worth his while to go on to prosecute his right at law. I rather imagine (it is a bold conjecture upon *Peere Williams's* report) that "at the hearing" means at the trial. There is no hearing upon a mere



bill of discovery. Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief; and where the person claims as heir of the body,

it has been very properly stated, that it may show a title [\* 72] in another person, if the entail is not well barred. It \* may set up a title, not to the benefit of Lady Shaftesbury, but to the injury of the devisees; indulging a speculation to the prejudice of parties, whose interest this Court has no right to invade.

I apprehend, they have no objection, that all the deeds purporting to be deeds of settlement creating entails shall be produced for inspection: otherwise it must go on to pointing interrogatories and asking for an answer. The defendant Arrowsmith must give himself the trouble of inspecting the deeds, and answering upon oath, whether they create an entail or not. Wherever you find a deed of entail, it would be very idle not to produce it, and also the deed, which destroys the entail: it would be no breach of duty in the trustees to give that qualified communication of the deeds: but rather the contrary. The plaintiff has a right to an answer to this question: are there any deeds, that contain a limitation in tail general?

As to the other part of the motion, it would be very proper to make an order for the deposit of the deeds in the other cause.

The order pronounced was, that the defendants shall give inspection of all deeds of settlement, set out in the schedule, creating estates in tail general.

### **Bolton v. Corporation of Liverpool.**

1 Mylne & Keen, 88-97.

#### *Discovery. — Title Deeds. — Confidentiality.*

[88] On a bill of discovery in aid of the defence to an action brought by a corporation for the recovery of town dues, the defendants by their answer admitted that they had in their custody and relating to the matters mentioned in the bill, divers cases which had been prepared and laid before counsel in contemplation of the then pending litigation, as also certain grants and deeds, which were the title deeds and documents evidencing their title to the dues in question: *Held*, that the plaintiffs in equity were not entitled to an inspection of such cases or deeds.

The plaintiffs, who were merchants and copartners in Liverpool, were defendants in an action, brought by the corporation,

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for the recovery of certain dues levied by the corporation upon the traders of that town. The bill was filed for the purpose of obtaining a discovery from the corporation in aid of the plaintiffs' defence to the action at law.

The bill among other things charged that divers cases had been lately submitted to counsel, for their opinion, touching the right of the corporation to receive the tolls and duties, and from which, if produced, it would appear that the corporation had no such right, and that all such cases were then in the possession or power of the defendants; and it further charged that the defendants had in their possession or power divers charters, grants, deeds, books, accounts, letters, copies of and extracts from letters, cases, written statements, tables or lists of town dues, tolls or duties, bills, informations, pleas, answers, memorandums, papers, and writings, relating to the matters contained in the bill; and by which, if produced, the truth of those matters would appear.

The defendants, by their further answer, among other things, admitted that divers cases or statements had lately been submitted to counsel, by the corporation, for their opinion on the subject of or relating to the right of the corporation to levy and receive the dues or customs aforesaid; and that all such cases or statements were then in the possession or power of the defendants;

\*that they had in the second schedule to their further [\*89] answer annexed, and which they prayed might be taken as part thereof, set forth a list of such last mentioned cases or statements; but that such cases or statements so scheduled as aforesaid were prepared in contemplation of, and with reference to, the action in the bill mentioned, and with reference to this suit; and the defendants submitted that they ought not to be compelled to produce the same. However, the defendants denied that if such cases and statements were produced, it would appear that the corporation were well aware, or had reason to believe or suppose, or that the fact was that they had no right to levy or receive such town dues, tolls, or duties, or customs, or otherwise than as aforesaid; but that, on the contrary, it would appear that the corporation had the right as then contended for by them. The defendants further admitted that they had then, in their possession, certain grants, deeds, documents, and papers, relating to the matters aforesaid, and that they had in the third schedule to their said answer, and which they prayed might be taken as part

thereof, set forth a list of such grants, deeds, documents, and papers. But the defendants said that many of such grants, deeds, and documents, were the title deeds and documents evidencing and showing the title of the corporation to the town and lordship of Liverpool, and to the town dues and customs aforesaid; and that many of such documents and papers were copies of accounts from public offices, and that they had in the said schedule particularized and distinguished which of the said grants, deeds, and documents were the title deeds and documents evidencing the title of the corporation to the town and lordship of Liverpool, and town dues and customs aforesaid, and which of the said [\*90] documents and papers were copies of \*accounts from public offices; and the defendants submitted that they ought not to be compelled to produce such grants, deeds, documents, and papers.

A motion was made before the VICE-CHANCELLOR that the plaintiffs and their agents might be at liberty to inspect and take copies of the cases or statements and documents mentioned in the defendants' further answer, and in the second and third schedules thereto. The VICE-CHANCELLOR refused the application, except in so far as it related to certain cases submitted to counsel on the defendants' behalf many years ago, and long before the present legal proceedings were in contemplation.<sup>1</sup> And the motion was now renewed.

Mr. Pepys and Mr. Kindersley, for the motion; and the Solicitor-General (Sir W. Horne), Sir C. Wetherell, Sir E. Sugden, and Mr. Duckworth, against it, followed respectively the same general line of argument as they had taken in the Court below.

In addition to the cases cited for the plaintiff upon the original motion, reference was made to *Preston v. Carr*, 1 Y. & J. 175 (and see also *Newton v. Berresford*, 1 Younge, 337; *Whitchbread v. Gurney*, 1 Younge, 541), as an authority to show that upon the rule which enforces the production of cases for counsels' opinion, no distinction has ever been taken, for the purpose of confining the order to such cases as had not been prepared with reference to existing proceedings. The different topics urged by counsel in support of the application are so fully stated and discussed in the

<sup>1</sup> 3 Sim. 467, where the facts of the case and the argument on the motion before his Honour, are very fully reported.

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\* LORD CHANCELLOR's judgment that it has been considered [\*91] unnecessary to report them in detail.

The LORD CHANCELLOR (LORD BROUGHAM).

In this case, an action for tolls having been brought by the corporation against the plaintiffs in equity, the question was touching the right of the plaintiffs, who were the defendants at law, to have certain documents referred to in the schedules to their answer, produced in aid of the defence at law; and those documents being of two descriptions, raised two separate questions; the one relating to papers of various kinds, evidencing the title of the corporation to the town and lordship of Liverpool, and to the dues and customs in question; the other relating to cases and statements submitted to counsel in contemplation of and pending the present proceedings at law and in equity.

First, as to the documents evidencing title. I entertain the same view of this question which his Honour did when he refused the application. I take the principle to be this: — A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. Thus an heir at law cannot, in that character, call for the general inspection of deeds in the possession of a devisee.

\* In *Lady Shaftesbury v. Arrowsmith* (p. 712, *ante*), 4 Ves. [\*92] 66 (4 R. R. 181), Lord LOUGHBOROUGH said "he could not find any spark of equity for such an application as that;" admitting that the heir in tail (and so he decided) had a right to inspect settlements creating estates in tail general; the party stating himself to be the heir of the body.

The plaintiff here does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title: they are the corporation's title and not his, and they are only his negatively, by failing to prove



that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, "Prove me liable, if you can." The corporation have certain documents which, they say, prove this liability. He cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are.

The case of *The Princess of Wales v. Lord Liverpool*, 1 Swan. 114, 580, was cited; and it is, perhaps, a strong case. But it is a peculiar one. Lord ELDON at first refused the application, and then granted it in the special circumstances. The instruments were two promissory notes, upon which the suit was brought against executors. Lord ELDON, in delivering judgment [\*93] upon that case, \*threw out many observations as to what might appear on an inspection. The notes, he said, might be duplicates; they might have important variations; some question might arise on the stamps, and they might, at any rate, said his Lordship, be given up at the hearing; for an indemnity will not do; at least, that is questionable. Yet he held all this matter of surmise not to be enough; for he required the defendant to state in what respect the inspection of the notes was material for his defence, and upon affidavits of circumstances impeaching their genuineness, he thought enough appeared to warrant an order that the defendant should not be compelled to answer till he had obtained the inspection. It must be admitted, that there the thing sought, and in substance allowed to be inspected, was not any matter collateral, but the very instrument on which the title of the plaintiff rested, and which could only be the title of the defendant by failing to support that of the plaintiff. His Lordship may have considered the instruments as a sort of title common to both parties; but it could only be so by the one party setting them up, and the other impeaching them on flaws discoverable by inspection. It must, however, be observed, that this was a kind of case in which, at law, inspection would have been given.

In this case, therefore, I can, upon the whole, see no reason for coming to a different conclusion from that at which his Honour arrived, when he refused inspection of those parts of the corporation's title, as being theirs, and not the plaintiffs', and not common to both.

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Next with respect to the cases sought to be inspected. These are the cases laid before counsel, in contemplation of the action, and pending the proceedings. Their dates come down to the 29th of October, 1831, the bill having been filed in November, 1830, and the \*answer sworn in December, 1831. Most [\*94] of the cases were laid before counsel after the demurrer was argued; nay, after it came before me on appeal; some of them on the very eve of the present application to the VICE-CHANCELLOR. They are sworn in the answer "to have been prepared in contemplation of and with reference to the action and suit." It is suggested, that one of them is the very brief for counsel at the trial of the action, to prepare himself against which the plaintiff in equity claims the inspection. And whether this be so in point of fact, or not, is immaterial, as it may well occur in any cause, if the cases laid before counsel in reference to that cause can be obtained by coming to this Court.

It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel, to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into Court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were plaintiff) postpone the trial, and obtain a discovery of those new circumstances, which, in all likelihood, had been laid before counsel for advice. If it be said that this Court compels the disclosure of whatever a party has at \*any time said respecting his case; nay, even wrings [\*95] his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his

case except his legal advisers. But without such communication no person can safely come into a court, either to obtain redress or to defend himself.

Yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favour we must submit. *Radcliffe v. Fursman*, 2 Bro. P. C. 514; Toml. ed., is the case commonly relied on in these questions. It is a decision of Lord KING's, affirmed in the House of Lords. If it had decided the question, there would have been no alternative but submission. The report in Brown's Parliamentary Cases is imperfect, and in one respect not correct; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases, which I have examined together with my noble and learned predecessor, it appears plain that the record did not show any suit to have been instituted or even threatened at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the Court had no right to know anything which the record did not disclose. All the Court knew was, that a case had been laid before counsel at some time, in order to satisfy the party consulting, whether his rights had been affected by a certain lapse of time. And the ground on which the production was resisted appears to have been the mischief of disclosing statements confidentially made for the private ease and satisfaction of parties.

[\* 96] \* So far this decision rules that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel, in reference to or in contemplation of, or pending the suit or action, for the purposes of which the production is sought.

The case of *Preston v. Carr*, 1 Y. & J. 175, would seem to have carried the doctrine of *Radcliffe v. Fursman*, this one most material step farther, but apparently without intending to do so, for one of the learned judges says that he agrees with those who have expressed an opinion that it should not be carried farther.

There is, however, a decision of this Court since *Preston v. Carr*, by which I am disposed to be guided, in deference as well to all the principles upon which it proceeds, as to the authority of the noble and learned judge who pronounced it; I mean the

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case of *Hughes v. Biddulph*, 4 Russ. 190. I can see no difference between the letters there excepted from the order to produce documents, and the cases laid before counsel. They were letters which passed between the client and the solicitor, and between two solicitors employed by the client in the progress of the cause, or with reference to the cause before it was instituted. This was the line which Lord LYNCHURST drew, and I can see no difference between the statements of a case in such correspondence, and the statements which are laid before counsel in the form of a case for their opinion. Something which occurred in the correspondence, might happen to be kept out of the case so laid before counsel, and that might be a motive in one instance for not refusing the production of the case, while the party might have a reason for refusing the letters. But that is accidental and \*can- [\* 97] not affect the principle; for it is clear that the case may, and in such circumstances, probably will, contain as much matter as the letters, which the client cannot safely disclose: and it may very well happen that the case prepared by the solicitor should contain more than the letters.

*Vent v. Pacey*, 4 Russ. 193, which followed two years after, though reported next in the same volume, is said to throw a doubt upon *Hughes v. Biddulph*, at least as far as regards its application to this question. In the first place, however, the VICE-CHANCELLOR having acted on *Hughes v. Biddulph*, as regards the letters, his order was appealed from and affirmed. But next, it is said that a case laid before counsel appears incidentally to have been produced. The observation which I have made will explain that; for the party may not have resisted the production, on the accidental ground mentioned of the letters happening to contain what he was reluctant to disclose, though the case did not. But be that as it may, there was no contest on the production of the case, and the question was not decided.

I am therefore, upon the whole, of opinion that cases laid before counsel in the progress of a cause, and prepared in contemplation of, and with reference to an action or suit, cannot be ordered to be produced for the purposes of that action or suit.

#### ENGLISH NOTES.

As to the right to production of deeds irrespective of the right between the parties to an action for the immediate purpose of the action; the



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general rule is that the right of production, — *i. e.*, the right to have the deeds produced for the purpose of manifesting the title of the person demanding the production — exists as an equitable right (if not always a strictly legal right according to the system before the Judicature Acts) in favour of the owner of any interest in the land to which the deeds relate. It exists in favour of an heir in tail or a person entitled to a vested reversion against the tenant for life. *Lady Shaftesbury v. Arrowsmith* : *Davis v. Dysart* (1855), 20 Beav. 405, 24 L. J. Ch. 381. It exists in favour of a tenant in common or other person holding under a common title with the person having possession of the deeds. *Shore v. Collett* (1815), G. Coop. 234, 237; *Lambert v. Rogers* (1817), 2 Mer. 489, 490, 16 R. R. 204, 205; *Fain v. Ayers* (1826), 1 Russ. 259 *n.* It exists in favour of a beneficiary against a trustee. *Simpson v. Bathurst* (L. C. 1869), L. R. 5 Ch. 192, at p. 202; *Re Cowin, Cowin v. Gravett* (1886), 33 Ch. D. 179, 56 L. J. Ch. 78, 34 W. R. 735. Formerly there was an exception in the case of a mortgagor who was not entitled as against the mortgagee to production of the deeds, without paying off the mortgage; *Chichester v. Marquis of Donegall* (1870), L. R. 5 Ch. 497 at p. 502, 39 L. J. Ch. 694, 22 L. T. 458, 18 W. R. 531. But the exception does not now apply in the case of a mortgage made after 1881, — for by section 16 of the Conveyancing Act, 1881, the mortgagor under such a mortgage is entitled, so long as his right to redeem subsists, at reasonable times, and on payment of costs, to inspect and make copies of or abstracts from the documents of title of the mortgaged property in the custody or power of the mortgagee.

As between parties to an action, the general rule before the Judicature Acts was that a Court of Equity while exercising the auxiliary jurisdiction would not grant discovery in aid of the legal title against a *bonâ fide* purchaser for valuable consideration; *Bassett v. Nosworthy* (1673), 2 Wh. & T. 1; *Wallwyn v. Lee* (1801), 9 Ves. 24, 7 R. R. 142. But the principle of these decisions so far as relates to the right of production and discovery between the parties to an action, is no longer applicable; since, under the Judicature Acts, courts of common law stand in no need of the auxiliary jurisdiction of equity; and each Court can give complete relief; *Ind Coope & Co. v. Emmerson* (1887), 12 Ap. Cas. 300, 56 L. J. Ch. 989, 56 L. T. 778, 36 W. R. 243.

Even before the Judicature Acts, the plea of *bonâ fide* purchase for value was no answer to a bill for discovery, where the Court of Equity was exercising its exclusive or concurrent jurisdiction; *Williams v. Lambe* (1791), 3 Bro. C. C. 264; *Collins v. Archer* (1839), 1 Russ. & My. 284, and some of the cases referred to below.

A plaintiff will not be allowed to inspect documents in the possession of the defendant, when the action is not *bonâ fide*, and has been brought

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merely to assist the plaintiff in another suit commenced against a third party; *Temperley v. Willett* (1856), 6 El. & Bl. 380, 25 L. J. Q. B. 259.

Where a bill of discovery was filed by the heir at law in aid of an action of ejectment, it was held that the principle upon which an heir in tail is entitled to inspect deeds of settlement creating the estate tail does not apply to a suit by the heir at law. In a suit of this nature, the latter is entitled to production of all such parts of deeds and writings admitted by the defendants as relate to or tend to show his pedigree; *Rumbold v. Forteith* (1857), 3 K. & J. 748. And see *Lyell v. Kennedy* (H. L. 1883), 8 App. Cas. 217, 32 L. J. Ch. 385 (No. 1 of "Discovery," 9 R. C.).

To an action to recover the price of gas supplied by the plaintiffs to the defendant, the defence was that the gas was of inferior quality, as the result of certain experiments made by and in the possession of the defendant showed. The results were ordered to be produced, as they might sustain the plaintiff's case. *The London Gaslight Company v. The Vestry of the Parish of Chelsea* (1859), 6 C. B. (N. S.) 411, 28 L. J. C. P. 275. So in *Coleman v. Truman* (1859), 3 H. & N. 871, 28 L. J. Ex. 5.

The plaintiffs in an action for diminishing certain water were allowed to inspect a deed referred to in the defence, under which the defendant justified the act complained of, although the plaintiffs were no parties to the deed, and the same related exclusively to the defendant's title. *The Penarth Harbour, Dock, and Railway Company v. Cardiff Water-works Company* (1860), 7 C. B. (N. S.) 816, 29 L. J. C. P. 230, 8 W. R. 215.

In *Jenkins v. Bushby* (1866), L. R. 2 Eq. 547, 35 L. J. Ch. 400, the question was one of boundary between the land of the plaintiff and defendants. The defendants admitted the possession of documents relating to the matter in issue, but denied that they would establish the plaintiff's title. They were ordered to produce the documents: but liberty was given to seal up anything not relating to the question at issue. Vice-Chancellor KINDERSLEY said: "Where the plaintiff has any case to make out, he has a right to discovery of anything that may assist his case, or even manifest the smallest title of it." *Per* KINDERSLEY, V. C., in judgment.

If a defendant denies the plaintiff's title, and says positively that the documents in his custody do not support the plaintiff's title, the Court will not order him to produce them. *Bennatyne v. Leader* (1839), 10 Sim. 230; *Minet v. Morgan* (1873), L. R. 8 Ch. 361, 42 L. J. Ch. 627, 28 L. T. 573, 21 W. R. 467; *Attorney-General v. Emerson* (1883), 10 Q. B. D. 191, 52 L. J. Q. B. 67, 48 L. T. 18, 31 W. R. 191; *Jones v. Watts* (C. A. 1890), 43 Ch. D. 574, 62 L. T. 471, 38 W. R. 725; *Morris*

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*v. Edwards* (H. L. 1890), 15 Ap. Cas. 309, 60 L. J. Q. B. 292, 63 L. T. 26. The last mentioned case also lays down that the defendant need not also allege that the documents in his possession do not impeach his own title.

The defendant will, however, be ordered to produce documents if he does not positively say that they do not support the plaintiff's title, but merely states that he has been advised to that effect. *Binnatyne v. Leader, supra*; *Budden v. Wilkinson* (C. A. 1893), 1893, 2 Q. B. 432, 63 L. J. Q. B. 32, 69 L. T. 427, 41 W. R. 657. So, if he does not deny knowledge of circumstances on the face of the documents which suggest a fraud, the defendant, even though a purchaser for value from the fraudulent person, will be ordered to produce the documents. *Kennedy v. Green* (1833), 6 Sim. 6. So, if he has misrepresented the nature of the documents, the Court will order their production; *Attorney-General v. Emmerson, supra*.

The fact that the defendants' solicitor has a lien on the document will not protect it from production; *Furlong v. Howard* (1804), 2 Sch. & Lef. 115, *per* REDESDALE, C.; *Fencott v. Clarke* (1833), 6 Sim. 8; *Fowler v. Fowler* (1881), 50 L. J. Ch. 686, 44 L. T. 799, 29 W. R. 800.

A defendant in his answer admitted the possession of documents relating to the matters in the bill, except the question whether A. survived B., which was the question upon which the plaintiff's title to the relief depended. It was held that the plaintiff was not entitled to the production of the documents; *Edwards v. Jones* (1843), 13 Sim. 632.

A person cannot be compelled to produce documents which are not in his sole control, or which are in the joint control of himself and another person. *Vivian v. Little* (1882), 11 Q. B. D. 370, 52 L. J. Q. B. 771, 48 L. T. 793, 31 W. R. 891; *Kearsley v. Phillips* (C. A. 1882), 10 Q. B. D. 465, 52 L. J. Q. B. 269, 48 L. T. 468, 31 W. R. 467 (affirming 10 Q. B. D. 36, 52 L. J. Q. B. 8, 31 W. R. 92).

The same principles apply to actions for the recovery of land as to other cases. *Lyell v. Kennedy* (1883), 8 App. Cas. 217, 32 L. J. Ch. 385 (No. 1 of "Discovery," 9 R. C.). And see further under the title "Discovery," Nos. 1, 2, 6, and notes.

#### AMERICAN NOTES.

The first principal case is cited on the general doctrine of Discovery, in 1 Pomeroy Equity Jurisprudence, sects. 181, 192; and the second in *ibid.*, sects. 202, 203. The second is cited in 1 Beach Equity Jurisprudence, sect. 866, with *Wheeler v. Le Marchant*, L. R. 17 Ch. D. 675; and in 1 Beach Equity Practice, sect. 522.







# NOTES

## ON

### ENGLISH RULING CASES

#### CASES IN 8 E. R. C.

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8 E. R. C. 1, REG. v. ANDERSON, 11 Cox, C. C. 198, 38 L. J. Mag. Cas. N. S. 12, L. R. 1 C. C. 161, 19 L. T. N. S. 400, 17 Week. Rep. 208.

#### **Criminal jurisdiction over ships.**

Cited in *Wildenhus's Case* (*Malie v. Keeper of Common Jail*) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383, holding unless exempted by treaty, a foreign merchant vessel entering a port of the United States for purposes of trade is subject to the local law, and the local courts may punish for crimes committed upon the vessel, within the port by one foreigner upon another foreigner; *Re Ross* (*Ross v. McIntyre*) 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897, holding that offense of murder committed on board of vessel of United States in Japanese waters is triable before American Consular court in Japan; *Rex v. The North*, 11 Can. Exch. 141, 11 B. C. 473, holding that seizure of vessel outside three mile limit for illegal fishing inside such limit is valid where chase began inside limit and was continuous; *R. v. Keyn*, L. R. 2 Exch. Div. 63, 46 L. J. Mag. Cas. N. S. 17, 13 Cox, C. C. 403 (dissenting opinion), as to foreigners on board British ships being subject to criminal laws of England; *R. v. Carr*, L. R. 10 Q. B. Div. 76, 52 L. J. Mag. Cas. N. S. 12, 47 L. T. N. S. 451, 31 Week. Rep. 121, 4 Asp. Mar. L. Cas. 604, 15 Cox, C. C. 129, 47 J. P. 38, holding court of England had jurisdiction of larceny committed on British ship at foreign port.

#### **Admiralty jurisdiction.**

Cited in *The Egyptian Monarch*, 36 Fed. 773, holding that proceeding in rem by seaman for personal injuries received on board English vessel while within English waters, is governed by law of England, though libellant is American citizen; *Re Lagrave*, 45 How. Pr. 301, 14 Abb. Pr. N. S. 336, holding that ships and vessels on high seas are treated as part of territory of country to which, according to nationality, they belong; *Rhodes v. Fairweather*, N. F. (1884-96) 321 (dissenting opinion), on extent of territorial jurisdiction of courts of New Foundland; *The Princess Royal*, L. R. 3 Adm. & Eccl. 27, 39 L. J. Prob. N. S. 29, 22 L. T. N. S. 29, as to the jurisdiction of admiralty court; *The Meece* [1895] P. 95, 64 L. J. Prob. N. S. 40, 11 Reports, 742, 71 L. T. N. S. 711, 43 Week. Rep. 209, 7 Asp. Mar. L. Cas. 529, holding the high court of Admiralty has jurisdiction over a claim in respect to necessities supplied to a foreign ship in a foreign port, if that port be upon the high seas.

Cited in notes in 46 L.R.A. 273, on jurisdiction over sea; 8 E. R. C. 11, on jurisdiction of offenses committed within territorial limits of government.

Cited in 1 Farnham, Waters, 44, on jurisdiction of courts over transactions on high seas.

Distinguished in *The M. Moxham*, L. R. 1 Prob. Div. 43, 107, holding where an English company possessed of a pier in Spain instituted a cause of damage against an English ship for negligently injuring the pier, the case was governed by law of Spain.

S E. R. C. 16, REG. v. TOLSON, 16 Cox, C. C. 629, 54 J. P. 4, 58 L. J. Mag. Cas. N. S. 97, 60 L. T. N. S. 899, L. R. 23 Q. B. Div. 168, 37 Week. Rep. 716.

### **Intent as an element of crime.**

Cited in *United States v. 1,150½ Pounds of Celluloid*, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627, holding that goods will not be forfeited which are unlawfully brought into this country by mere trespasser, without knowledge of owner, and with intent to himself appropriate money provided by owner for payment of lawful duties: *Jaycox v. United States*, 47 C. C. A. 83, 107 Fed. 938, holding that fact that master of tow boat, engaged in towing scows laden with refuse was asleep when injurious deposits were made in harbor contrary to act of June 20, 1888, would not relieve him from liability; *United States v. Southern R. Co.* 135 Fed. 122, holding that use of car with defective coupling is violation of Federal statute of March 2nd 1893, and it is no defense that railway company exercised reasonable care to keep coupling apparatus in repair: *United States v. Fifty Waltham Watch Movements*, 139 Fed. 291, holding that bringing merchandise into United States without complying with customs laws, but without intent to defraud, did not constitute offense at common law: *Scow No. 36*, 75 C. C. A. 572, 144 Fed. 932, holding that vessel used to deposit refuse matter in navigable waters, contrary to act of March 3, 1899, is subject to penalties therein prescribed, although act was without knowledge of owner and contrary to his general instruction: *State v. Turner*, 60 Conn. 222, 22 Atl. 542, holding that it is no defense to prosecution for offense under the section 1454 of general statutes, that defendant did the acts without guilty intent: *State v. Nussenholtz*, 76 Conn. 92, 55 Atl. 589, holding that knowledge upon part of accused, that flesh sold by him was of forbidden kind, was essential element of offense, under section 1346, of General Statutes: *Brown v. State*, 7 Penn. (Del.) 159, 25 L.R.A.(N.S.) 661, 74 Atl. 836, holding that in prosecution for harboring girl under 18 years for immoral purposes, representations as to her age made by girl are immaterial: *State v. Lally*, 2 Marv. (Del.) 424, 43 Atl. 258; *State v. Caldwell*, 1 Marv. (Del.) 555, 41 Atl. 198,—holding that under indictment for fraudulent registration as voter in two election districts, it is unnecessary to prove any criminal intent, but merely that prohibited act was committed by defendant: *State v. Chicago, M. & St. P. R. Co.* 122 Iowa, 22, 101 Am. St. Rep. 254, 96 N. W. 904, holding that where intent to violate penal statute is wanting, offense is not committed, unless an absolute liability is provided in statute: *Com. v. Enos*, 165 Mass. 66, 30 L.R.A. 734, 43 N. E. 504, 10 Am. Crim. Rep. 67, holding that lack of knowledge that girl is under sixteen years of age is no defense to prosecution under chapter 466 of laws of 1893: *Com. v. Mixer*, 207 Mass. 141, 31 L.R.A.(N.S.) 467, 93 N. E. 249, 20 Ann. Cas. 1152, holding that common carrier may examine packages to determine whether or not they contain liquor: *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953, holding that indictment under chapter 219 of Laws of 1905, relating to taking deposits by insolvent bankers, need not allege intent to defraud: *State v. Rehnitz*, 20 Mont. 488, 52 Pac. 264, holding that instruction defining larceny is

erroneous, if it omits to state criminal intent which is necessary to constitute crime; *People v. Abeel*, 45 Misc. 86, 91 N. Y. Supp. 699, holding that indictment for forgery under section 514 of Penal Code, Subd. 3, need not allege that defendant was guilty of intent to defraud; *Lightle v. State*, 5 Okla. Crim. Rep. 259, 114 Pac. 275, holding that it is no defense that defendant honestly believed that substitute for beer, for selling of which he was being prosecuted, contained less than  $\frac{1}{2}$  of 1 per cent of alcohol; *State v. Blue*, 17 Utah, 175, 53 Pac. 978, holding that where person violates statute making act criminal, and no reference is made in statute to criminal intent, general provision of law, which provides that "in every crime there must exist union of act and intent, or criminal negligence" must control; *State v. Clark*, 83 Vt. 305, 75 Atl. 534, Ann. Cas. 1912A, 261, holding that under statutes if facts proved establish crime punishable by death or imprisonment in state "prison, then crime was committed feloniously;" *Towles v. United States*, 19 App. D. C. 471, holding that in trial of indictment for forgery where defendant claimed to have authority to alter certain notes, question to be left to jury, is whether he had reasonable grounds for believing that he had authority; *Reg. v. Mellon*, 5 Terr. L. R. 301, holding that sale of liquor to half breed Indian who took treaty rights is not offense where seller had no means of knowing that such half-breed shared in treaty payments; *Re Hunter's License*, 24 Ont. Rep. 153, holding that contravention of provisions of Liquor License Act, must be wilful or knowing contravention; *Rex v. Sabeans*, 37 N. S. 223 (dissenting opinion), on effect of good faith and reasonable grounds for belief as affecting liability for breach of criminal law; *Rex v. Slaughenwhite*, 37 N. S. 382, holding that to constitute offense of wounding under code, section 242, it is not necessary to prove actual malice; *R. v. Hughes*, 12 B. C. 290, holding where there was nothing to show that defendant knew or had cause to suspect that person to whom defendant sold the liquor was reputed to belong to a particular band of Indians or followed the Indian mode of life, the defendant was not guilty of violating act against sale of liquor to Indians; *Burrows v. Rhodes* [1899] 1 Q. B. 816, 68 L. J. Q. B. N. S. 545, 63 J. P. 532, 48 Week. Rep. 13, 80 L. T. N. S. 591, 15 Times L. R. 286, on legal intent inhering in voluntary doing of a moral wrong in ignorance of a fact which makes it criminal.

Cited in notes in 8 E. R. C. 44, on criminal intent as essential to commission of crime; 8 Eng. Rul. Cas. 78, on laudable motive or object as defense to criminal act injurious to public; 16 E. R. C. 738, on effect of insanity as affecting criminal responsibility; 17 E. R. C. 272, on master's criminal liability for acts of servant.

Cited in *Freund Police P.* 659, on wrongful intent as essential to commission of crime; 2 *Thompson Neg.* 412, on what is gross, reckless, wanton, or wilful negligence of railroad company towards trespassers and licensees.

### — Bigamy.

Cited in *Com. v. Hayden*, 163 Mass. 453, 28 L.R.A. 318, 47 Am. St. Rep. 468, 40 N. E. 846, 9 Am. Crim. Rep. 408, holding that fact that at time one contracted polygamous marriage, he had bona fide and reasonable belief that his former wife was dead does not constitute defense: *Rex v. Brinkley*, 14 Ont. L. 434, 10 Ann. Cas. 407; *Rex v. Bleiler*, 1 D. L. R. 878,—holding that honest belief on part of defendant that he was divorced constitutes no defense to charge of bigamy.

Cited in note in 27 L.R.A.(N.S.) 1098, 1100, 1102, on belief in termination of former marriage as defense to prosecution for bigamy



**Construction of statutes.**

Cited in *Re Representation in House of Commons*, 33 Can. S. C. 475, to the point that courts may follow the reason rather than the letter of the law.

Cited in 2 *Sutherland*, Stat. Const. 2d ed. 975, 977, on strict construction of penal statutes.

8 E. R. C. 60. *REG. v. HICKLIN*, 11 Cox, C. C. 19, 37 L. J. Mag. Cas. N. S. 89, L. R. 3 Q. B. 360, 16 Week. Rep. 801, 18 L. T. N. S. 395.

**Criminal law, test of obscenity in publication.**

Cited in *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635, 2 N. Y. Crim. Rep. 375; *People v. Doris*, 14 App. Div. 117, 43 N. Y. Supp. 571, 12 N. Y. Crim. Rep. 100; *United States v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14,571; *United States v. Williams*, 3 Fed. 484; *United States v. Clarke*, 38 Fed. 500; *United States v. Clarke*, 38 Fed. 732; *United States v. Harmon*, 45 Fed. 414; *United States v. Smith*, 45 Fed. 476; *United States v. Moore*, 129 Fed. 159; *Shepard v. United States*, 87 C. C. A. 486, 160 Fed. 584; *R. v. Beaver*, 9 Ont. L. Rep. 418,—holding the test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands the publication may fall; *St. Louis v. King*, 226 Mo. 334, 27 L.R.A.(N.S.) 608, 136 Am. St. Rep. 643, 126 S. W. 495, holding that advertisement offering to cure venereal diseases by describing their symptoms in an inoffensive way is not obscene: *People v. Eastman*, 188 N. Y. 478, 81 N. E. 459, 11 Ann. Cas. 302 (dissenting opinion); *R. v. Barraclough* [1906] 1 K. B. 201, 75 L. J. K. B. N. S. 77, 70 J. P. 14, 54 Week. Rep. 147, 94 L. T. N. S. 111, 22 Times L. R. 41, 21 Cox, C. C. 91,—on necessity of averring the tendency to corrupt.

Cited in note in 24 L.R.A. 110, 111, on unlawfulness of obscene and indecent publications.

Cited in *Freund Police P.* 222, on tests of what constitutes obscenity.

**— Obscenity of publication as matter of fact.**

Cited in *People v. Muller*, 32 Hun, 209, 2 N. Y. Crim. Rep. 279, holding question whether certain photographs were obscene was question for jury.

**— Statute against obscene publications.**

Cited in *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938, holding it does not contravene amendment to constitution prohibiting laws against freedom of speech.

**Intent as element in crime.**

Cited in *State v. Engle*, 156 Ind. 339, 58 N. E. 698, holding an affidavit charging a person with removing his baggage from a rooming house in violation of innkeeper's act, need not contain an allegation that the defendant recovered the baggage with intent to defraud the rooming-house keeper.

Cited in note in 8 E. R. C. 78, on laudable motive or object as defense to criminal act injurious to public.

**— Obscene publication.**

Cited in *Sullivan County v. Grafton County*, 55 N. H. 339; *Com. v. Arentsen*, 20 Phila. 378, 47 Phila. Leg. Int. 414, 21 Pittsb. L. J. N. S. 101, 18 Wash. L. Rep. 672, 26 W. N. C. 359; *R. v. Prince*, L. R. 2 C. C. 150, 38 L. J. Mag. Cas. N. S. 8, 19 L. T. N. S. 364, 17 Week. Rep. 179; *Steele v. Brannan*, L. R. 7 C. P. 261, 41 L. J. Mag. Cas. N. S. 85, 26 L. T. N. S. 509, 20 Week. Rep. 607,—holding

the tendency of the publication being to corrupt, the defendant must be taken to have that object in view, even though his object may have been otherwise.

8 E. R. C. 81, REG. v. CHARLEWOOD, 2 East, P. C. 689, 3 Revised Rep. 706, 1 Leach, C. L. 409.

#### **Intent in crime.**

Cited in *People v. Gates*, 13 Wend. 311, holding a writing in the form of a bond, neither having the signature nor purporting to have the signature is not a false writing within the meaning of statute: *Hill v. State*, 57 Wis. 377, 15 N. W. 445, holding that if there is no felonious intent at time of hiring of horse, no subsequent conversion thereof will amount to felony.

#### **— Larceny by bailee.**

Cited in *Com. v. James*, 1 Pick. 375, holding where a miller having received barilla to grind fraudulently retained part of it, returning a mixture of barilla and plaster of paris, he was guilty of larceny.

#### **Subsequent act as evidence of intent.**

Cited in *Com. v. Rubin*, 165 Mass. 453, 43 N. E. 200, holding subsequent conduct evidence of prior intent; *Defrese v. State*, 3 Heisk. 53, 8 Am. Rep. 1, holding that evidence of other acts of prisoner may be admitted where guilty knowledge is to be proved, though they amount to substantive felonies.

Cited in note in 11 Eng. Rul. Cas. 247, as to evidence of other similar crimes.

#### **Merger of crimes.**

Cited in *Lambert v. People*, 9 Cow. 578, as to whether executed conspiracy to cheat is merged in felony or misdemeanor committed in pursuance of it.

8 E. R. C. 90, REG. v. THOMPSON, 62 L. J. Mag. Cas. N. S. 93, 69 L. T. N. S. 22 [1893] 2 Q. B. 12, 41 Week. Rep. 525.

#### **Admissibility of confession in respect to voluntariness.**

Cited in *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, holding that fact that confession is made to police officer while accused is under arrest, may be taken into account in determining whether or not confession was voluntary; *Sorenson v. United States*, 74 C. C. A. 468, 143 Fed. 820, holding that confession induced by Federal officer by statement that if accused who was in such officer's custody would plead guilty, another offense against state laws would be overlooked, is inadmissible; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408; *Harrold v. Oklahoma*, 94 C. C. A. 415, 169 Fed. 47, 17 Ann. Cas. 868,—holding that burden is upon prosecutor to prove to court that confession was voluntary, beyond reasonable doubt; *Hardin v. State*, 66 Ark. 53, 48 S. W. 904, holding a confession made by a prisoner to an officer having him in custody upon the latter's assuring him that they had evidence to convict him and exhorting him to tell the truth with other remarks intended to convey the idea that if he confessed it would save him from the death penalty, is involuntary and inadmissible; *Re Ockerman*, 6 B. C. 143, holding that evidence was insufficient upon which to extradite accused, where it consisted of admissions of accused, and there was nothing to show that they were not procured improperly; *Rex v. Todd*, 13 Manitoba L. Rep. 364, 1 B. R. C. 883, holding that inducement held out to accused person in consequence of which he makes confession must be one having relation to charge against him; *Rex v. Young*, 38 N. S. 427, holding that admission made to prosecuting officer in presence of defendant's counsel is invalid as evidence where no evidence was produced to show that de-

fendant was not under same influence that he was shortly before, when a government detective procured same confession at jail; *Rex v. Ryan*, 9 Ont. L. Rep. 137, 4 Ann. Cas. 875, holding that evidence of confession was admissible where there was no inducement or threat, but accused, a mail carrier, admitted having decoy letter in his possession when accused of having it; *Rex v. Steffoff*, 20 Ont. L. Rep. 103, holding that it is not necessary to show by direct affirmation of witnesses that no threats or inducements were held out to one making confession; *R. v. Brailsford*, 75 L. J. K. B. N. S. 64, [1905] 2 K. B. 730, 69 J. P. 370, 93 L. T. N. S. 401, 21 Times L. R. 727, 54 Week. Rep. 283, 21 Cox, C. C. 16, holding there being no evidence that the confession was other than free and voluntary, it was admissible.

Cited in note in 18 L.R.A.(N.S.) 775, 815, 844, as to when confession voluntary.

S. E. R. C. 107. *REX v. JUDD*. 2 East, P. C. 1018, 1 Leach, C. L. 484, 1, Revised Rep. 477, 2 T. R. 255.

#### **Criminal law — Warrant of commitment.**

Cited in *State v. Allgor*, 78 N. J. L. 313, 73 Atl. 76, holding that indictment setting forth act not malum in se or malum prohibitum, but criminal only from aspect given to act by extrinsic facts, must allege such facts; *Re Anderson*, 11 U. C. C. P. 1, holding charge should be clear and specific; *Connors v. Darling*, 23 U. C. Q. B. 541; *Re McCartney*, 8 Manitoba L. Rep. 367,—as to necessity of stating offense with sufficient certainty.

#### **Use of word “feloniously.”**

Cited in *People v. Robertson*, 3 Wheeler C. C. 180, holding commitment for felony good without stating that act was done feloniously.

#### **Fugitive from justice.**

Cited in *R. v. Van Aerman*, 4 U. C. C. P. 288, as to what constitutes.

#### **Admission to bail.**

Cited in *State v. Abbott*, R. M. Charl. (Ga.) 244, holding judges of the superior court have discretionary power to grant bail in all cases whatsoever.

#### **Presumption that legislature understood language employed in act.**

Cited in *Crane v. Reeder*, 28 Mich. 527, 15 Am. Rep. 223, holding it is presumed that legislature understood the meaning of words employed.

S. E. R. C. 111, *REG v. GRAY*, 9 Cox, C. C. 417, 10 Jur. N. S. 160, 33 L. J. Mag Cas. N. S. 78, 9 L. T. N. S. 733, 12 Week. Rep. 350, Leigh & Cave Cr. Cas. 365.

#### **Necessity of “feloniously” in indictment.**

Cited in *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *City Bank v. Macdonald*, 16 U. C. C. P. 215,—as to necessity of using word “feloniously”; *State v. Murphy*, 17 R. I. 698, 16 L.R.A. 550, 24 Atl. 473, holding when no statute defines felony, and no statute prescribes a form of indictment the word “feloniously” should be used in indictments charging offences which were felonies at common law, but in other indictments the word is not essential; *State v. McGrath*, 228 Mo. 413, 128 S. W. 966, holding that where offense is statutory and is made felony, it is necessary to use word “feloniously” in charging it; *Reg. v. Inglis*, 25 N. S. 259, holding that indictment for larceny must use word “feloniously” in reference to the taking of the goods; *Reg. v. Gough*, 3 Ont. Rep. 402, holding that indictment under statute for malicious injury to property is bad, if word feloni-

ously is omitted; *Reg. v. Boucher*, 8 Ont. Pr. Rep. 20, holding that indictment for felony must charge that act was done "feloniously."

Cited in note in 8 Eng. Rul. Cas. 136, 130, on sufficiency of indictment.

8 E. R. C. 117, *REX v. PERROTT*, 2 Maule & S. 379, 15 Revised Rep. 280.

### **Sufficiency of indictment.**

Cited in *United States v. Dickinson*, 2 McLean, 325, Fed. Cas. No. 14,958, as to validity of indictment containing several charges of the same nature in different counts; *Graham v. State*, 1 Ark. 171, holding an indictment must be sufficiently explicit to support itself; *Locke v. State*, 3 Ga. 534, holding in indictment under statute for bastardy it is necessary to charge distinctly that defendant is the father of the bastard child; *State v. Read*, 6 La. Ann. 227, holding in a prosecution under statute against a person for having used language of a tendency to produce discontent and insurrection among the slaves, it is essential that the indictment should set forth the words thus used, and charged that they were used with felonious intent; *Sullivan v. State*, 67 Miss. 346, 7 So. 275, 8 Am. Crim. Rep. 656, holding that under "prize fighting act" indictment is defective which charges merely that accused entered prize ring and beat, and bruised another; *Territory v. Cortez*, 15 N. M. 92, 103 Pac. 264, holding that indictment charging unlawful killing of cattle under laws of 1897, which omits to allege that such killing was "knowingly done" is fatally defective; *Tipton v. State*, Peek (Tenn.) 307, holding that caption to indictment should show that grand jury were of county where indictment was found; *Hughes v. Allen*, 69 Vt. 95, 28 Atl. 882, holding that complaint which charges breach of peace by "threatening to strike, beat, injure and assault divers and sundry persons" without naming them or alleging that their names are unknown, is bad on general demurrer; *Bradlaugh v. R. L. R.* 3 Q. B. Div. 607, 38 L. T. N. S. 118, 26 Week. Rep. 140, 14 Cox, C. C. 68, holding in an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, but the words thereof must be set out; *R. v. Switzer*, 14 U. C. C. P. 470, holding indictment for certifying false voting list which failed to show explicitly how, and in what respect certain names should or should not have been on the list, bad; *Bulfer v. People*, 141 Ill. App. 70; *People v. Winner*, 80 Hun, 130, 30 N. Y. Supp. 54, 9 N. Y. Crim. Rep. 288; *Com. v. Strain*, 10 Met. 521; *R. v. Aspinall*, L. R. 2 Q. B. Div. 48, 46 L. J. Mag. Cas. N. S. 145, 36 L. T. N. S. 297, 25 Week. Rep. 283, 13 Cox, C. C. 563,—holding an indictment must contain an allegation of every fact necessary to constitute the criminal charge preferred by it.

Cited in note in 8 Eng. Rul. Cas. 114, 137, on sufficiency of indictment.

### **Averments of falsity as an element of crime.**

Cited in *Gibson v. State*, 44 Ala. 17; *Territory v. Lockhart*, 8 N. M. 523, 45 Pac. 1106,—holding that the falsity of the testimony must be assigned by a negative of the testimony set out; *State v. Mumford*, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573; *Daniels v. State*, 57 Fla. 7, 49 So. 128, 17 Ann. Cas. 919,—holding that it is necessary in indictment for perjury to expressly and positively negative the truth of alleged false swearing, by stating facts by way of antithesis; *Daniels v. State*, 57 Fla. 7, 49 So. 128, 17 Ann. Cas. 919,—holding that it is necessary in indictment for perjury to expressly and positively negative the truth of alleged false swearing, by stating facts by way of antithesis; *State v. Nelson*, 74 Minn. 409, 77 N. W. 223, holding that indictment for perjury must specify wherein testimony of accused was false; *State v. Peacock*, 31 Mo. 413, holding that indictment under statute, for false pretenses by which property was obtained must be falsified by distinct and specific averments,



as in assignment of perjury; *People v. Phelps*, 5 Wend. 9, holding in an indictment for perjury by an insolvent debtor, in the oath taken by him on presenting his petition and inventory of his estate required by the statute, it is not necessary to set forth the facts which give jurisdiction to the officer; *Com. v. Garver*, 16 Phila. 468, 40 Phila. Leg. Int. 210; *Britt v. State*, 9 Humph. 31,—holding that single pretenses proved as laid in indictment for obtaining money by false pretenses, is sufficient to support conviction, though such pretense is joined with others in same court; *State v. Smith*, 63 Vt. 201, 22 Atl. 604, holding that indictment for perjury which alleges that accused gave testimony which was untrue, "willfully and corruptly" is sufficient, although it omits word "falsely;" *Fitch v. Com.* 92 Va. 824, 24 S. E. 272, holding that in indictment for perjury it is indispensably necessary to charge that defendant swore "falsely."

#### **— In indictment for false pretenses.**

Cited in *United States v. Watkins*, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649, holding in an indictment for obtaining money by false pretenses the averment must state what was pretended and that what was pretended was false and wherein and in what particular it was false: *People v. Stone*, 9 Wend. 182, holding it is not necessary to negative all the pretenses set forth in an indictment for obtaining property under false pretenses, but those relied upon by the state and which it expects to prove were false must be specifically and directly negatived; *Lambert v. People*, Lockwood, Rev. Cas. 232; *Com. v. Davidson*, 1 Cush. 33; *People v. Hart*, 35 Misc. 182, 71 N. Y. Supp. 492, 15 N. Y. Crim. Rep. 483; *Cunningham v. State*, 61 N. J. L. 666, 40 Atl. 696; *Peoples v. Haynes*, 14 Wend. 546, 28 Am. Dec. 530; *People v. Haynes*, 11 Wend. 557; *Com. v. Williams*, 1 Pearson (Pa.) 62; *Amos v. State*, 10 Humph. 117,—holding an indictment for obtaining goods under false pretenses is fatally defective which fails to negative by special averment, the pretenses therein stated.

#### **Allegation of falsity in action for deceit.**

Cited in *Byard v. Holmes*, 34 N. J. L. 296, holding complaint must contain a distinct and specific averment of the falsehood of each separate matter of fact stated by the defendant and intended to be denied by plaintiff.

8 E. R. C. 126, *HEYMANN v. R.* 12 Cox, C. C. 383, L. R. 8 Q. B. 102, 28 L. T. N. S. 162, 21 Week. Rep. 357.

#### **Verdict as curing defective averment in indictment.**

Cited in *United States v. Noelke*, 17 Blatchf. 555, 1 Fed. 426, holding informal description of lottery letter cured; *United States v. Bayaud*, 21 Blatchf. 287, 16 Fed. 376, holding want of averment of an intent, if necessary, was cured by verdict on plea of guilty; *Beard v. State*, 79 Ark. 293, 95 S. W. 995, 9 Ann. Cas. 409, holding if indictment omits entirely an allegation of some essential element of the crime charged it is not cured by verdict; *State v. Ryan*, 68 Conn. 512, 37 Atl. 377, holding mere defects in form or manner of charging and describing offense cured by verdict; *State v. Kenna*, 63 Conn. 329, 28 Atl. 522, holding omission in an indictment for arson which does not show that the house burned was the dwelling house of one other than accused is not cured by verdict; *Woodworth v. State*, 145 Ind. 276, 43 N. E. 933, holding an affidavit and information for an assault with intent to commit the crime of larceny which does not allege that defendant attempted to perpetrate a violent injury, or that he had the ability to commit the injury is sufficient to withstand a motion in arrest of judgment; *State v. Luxton*, 65 N. J. L. 605, 40 Atl. 535, holding in an indictment for obtaining money under false pretenses a general averment that the preense was false will be deemed sufficient after verdict; *Crawford v. Beattie*,

39 U. C. Q. B. 13, holding there is no distinction of civil from criminal cases as to cure of pleadings by verdict; *State v. Freeman*, 63 Vt. 496, 22 Atl. 621; *R. v. Gibson*, 160 Ont. Rep. 704; *R. v. Aspinall*, L. R. 2 Q. B. D. 48, 46 L. J. Mag. Cas. N. S. 145, 36 L. T. N. S. 297, 25 Week. Rep. 283, 13 Cox, C. C. 563; *R. v. Silverlock* [1894] 2 Q. B. 766, 63 L. J. Mag. Cas. N. S. 233, 10 Reports, 431, 43 Week. Rep. 14, 58 J. P. 788,—as to when verdict cures imperfect averment in indictment: *R. v. Goldsmith*, L. R. 2 C. C. 74, 42 L. J. Mag. Cas. 94, 28 L. T. N. S. 881, 21 Week. Rep. 791, 12 Cox, C. C. 479, holding that an imperfect general averment of false pretenses was cured by verdict.

#### **Sufficiency of indictment for crime resting in words.**

Cited in *State v. Hauser*, 112 La. 313, 36 So. 396, holding that indictment which charged making of "false bill or order for payment of money" with intent to cheat and defraud and that he feloniously published this false bill as true, sufficiently charged scienter to withstand attack made in motion in arrest of judgment for want of recital of knowledge; *Bradlaugh v. R.* L. R. 3 Q. B. Div. 607, 38 L. T. N. S. 118, 26 Week. Rep. 410, 14 Cox, C. C. 68, holding of libel that the words must be set out; *R. v. Munslow* [1895] 1 Q. B. 758, 64 L. J. Mag. Cas. N. S. 138, 15 Reports, 192, 72 L. T. N. S. 301, 43 Week. Rep. 495, 18 Cox, C. C. 112, holding there is no distinction at common law between the pleadings in civil and criminal cases as to the necessary averments of crimes resting in words.

#### **Offense of conspiracy at common law.**

Cited in *State v. Dalton*, 134 Mo. App. 517, 114 S. W. 1132, holding that common law relating to conspiracies still prevails in this state unless abrogated by sections 2152 and 2153, of revised statutes of 1899.

8 E. R. C. 138, *REX v. BRISAC*, 4 East, 164, 7 Revised Rep. 551.

#### **Conspiracy, proof of by inference.**

Cited in *Scott v. State*, 30 Ala. 503; *R. v. Connolly*, 25 Ont. Rep. 151; *R. v. Master Plumbers & Steam Fitters Co-op. Asso.* 14 Ont. L. Rep. 295,—holding it is a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them; *Mulcahy v. R.* L. R. 3 H. L. 306, as to proof of conspiracy.

#### **—Venue in trial for conspiracy involving two or more places.**

Cited in *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793 (affirming 35 App. D. C. 451), holding that indictment for conspiracy to defraud the United States may be tried at place where overt act is performed; *Arnold v. Weil*, 157 Fed. 429, holding where a conspiracy to defraud the United States of public lands was originally formed in one Federal district, but was carried on by means of false and fraudulent entries of such lands in another district made with the knowledge and consent of all the conspirators, each of such overt acts constituted a renewal of the conspiracy in the latter district, and the offence may be prosecuted in either; *Robinson v. United States*, 96 C. C. A. 307, 172 Fed. 105, holding that charge of conspiracy to commit offense against United States, under Rev. St. § 5440, may be prosecuted in any district where an overt act was committed; *State v. Soper*, 118 Iowa, 1, 91 N. W. 774, holding acts done in another county may be shown for the purpose of establishing the conspiracy; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122, holding the venue may be laid in the county where an overt act was done by any of the conspirators or in county where agreement was entered into; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *Com. v. Bartilson*, 85 Pa. 482, 5 W. N. C. 177, 35 Phila. Leg. Int.

91,—holding venue in indictment for conspiracy may be laid in any county in which an overt act has been done by any of the conspirators; *State v. Whaley*, 2 Harr. (Del.) 538; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; *People v. Rathbun*, 21 Wend. 509; *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504.—as to venue of trial for conspiracy; *Com. v. Corlies*, 8 Phila. 450, 26 Phila. Leg. Int. 397, 450, 27 Phila. Leg. Int. 397, 3 Brewst. (Pa.) 575, holding that upon indictment for conspiracy venire may be laid in any county where an overt act was committed; *Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654, holding that where it appears that a conspiracy to fabricate titles to lands in this state was entered into here, and that an overt act was perpetuated here, courts of this state have jurisdiction, though actual fabrication took place in another state.

Cited in note in 19 L.R.A. 777, on locality of crime committed through agency of mails or of carriers.

#### **Falsification of amounts.**

Cited in *R. v. Oliphant* [1905] 2 K. B. 67, 74 L. J. K. B. N. S. 591, 53 Week. Rep. 556, 69 J. P. 230, 21 Times L. R. 416, 94 L. T. N. S. 824, 21 Cox, C. C. 192, holding there is no difference between a false return and an omission from a return.

#### **Crimes committed by person acting outside jurisdiction of court.**

Cited in *Com. v. White*, 123 Mass. 430, 25 Am. Rep. 116, holding a thief, who steals goods in another state, and sends them into this commonwealth by an agent, not an accomplice in the theft may be indicted for larceny here; *Noyes v. State*, 41 N. J. L. 418; *People v. Adams*, 3 Denio, 190, 45 Am. Dec. 468.—holding in case of the commission of an offense within this state by means of an innocent agent, the employer is guilty as principal though he did not act in this state, and was at the time the offense was committed in another state: *Com. v. Seybert*, 4 Pa. Co. Ct. 152, as to jurisdiction of Court of Crimes committed by persons without its jurisdiction through the agency of innocent persons within its jurisdiction: *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, holding person abroad may commit crime of abortion in this state by sending drugs to woman here.

Distinguished in *Johns v. State*, 19 Ind. 421, 81 Am. Dec. 408; *State v. Moore*, 26 N. H. 448,—holding where a felony is procured in another state, to be committed within this state the accessory before the fact cannot be tried for the offense of procuring the commission of the crime in the county in this state in which the principal offense is committed.

#### **Criminal acts committed through others.**

Cited in *People ex rel. Phelps v. Oyer & Terminer Ct.* 83 N. Y. 436, holding it not material that bill went through hands of other and independent officers before reaching mayor, who might have stopped its progress, and this whether they were misled by fraud of accused or obeyed his orders.

S E. R. C. 150, *ATTY. GEN. v. SANDS*, Hardres. 488, 2 Freem. Ch. 129, 3 Rep. in Ch. 33, *White & T. Lead. Cas.* in Eq. 760, Nelson 130.

#### **Escheat of lands without office found.**

Cited in *Harlock v. Jackson*, 3 Brev. 254, holding in case of escheats for want of heirs the freehold is vested in the State, from the time of the death, and no office is necessary; *Chisholm v. Sheldon*, 2 Grant, Ch. (U. C.) 178, to the point that when the lord takes inheritance as escheated, he takes term as attendant upon and following fate of inheritance.

Cited in note in 18 Eng. Rul. Cas. 376, on forfeiture to crown of mortgagor's estate in mortgaged property.

**—Remedy to enforce escheat of trust lands.**

Cited in *Atkins v. Kron*, 40 N. C. (5 Ired. Eq.) 207; *Escheator of St. Phillips & St. Michael's v. Smith*, 4 McCord, L. 452,—as to land held in trust for alien not escheating to state through inquisition but an action in equity being necessary; *Hubbard v. Goodwin*, 3 Leigh, 492, holding commonwealth had right to recover land held in trust for alien by bill in equity; *Richardson v. Dickson*, 2 U. C. Q. B. O. S. 326; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343, 41 L. J. Ch. N. S. 576, 26 L. T. N. S. 142, 20 Week. Rep. 269,—holding Crown cannot by virtue of office found out trustees who are seised of land in trust for an alien, but is driven to its remedy in equity.

Cited in note in 9 E. R. C. 288, on escheat of trust lands.

8 E. R. C. 161, *MIDDLETON v. SPICER*, 1 Bro. Ch. 201, Reg. Lib. 1782. B. fol. 568 b.

**Escheat for want of heirs or kin.**

Cited in *Tessier v. Wyse*, 3 Bland, Ch. 28; *Hepburn's Case*, 3 Bland, Ch. 95,—as to debts of debtor being paid out of escheated estate; *Com. v. Blanton*, 2 B. Mon. 393; *Darrah v. McNair*, 1 Ashm. (Pa.) 236,—holding where testator leaves no widow or next of kin the commonwealth takes the residue in preference to executor, who would be but a trustee for commonwealth; *Dykes v. Woodhouse*, 3 Rand. (Va.) 287, as to crown being entitled to estate when there are no distributees; *Atty. Gen. v. O'Reilly*, 26 Grant, Ch. (U. C.) 126, as to general doctrine of; *Mercer v. Atty. Gen.* 5 Can. S. C. 538 (dissenting opinion), on province as representing her majesty in matters of escheat.

Cited in note in 8 Eng. Rul. Cas. 177, on running of limitations against government.

**—Trust lands or properties.**

Cited in *Marshall v. Lovelass*, 1 N. C. 217, as to lands of cestui que trust not being forfeited by reason of misconduct of trustee; *Hubbard v. Goodwin*, 3 Leigh, 492, holding Court of Equity will compel trustee of alien to execute trust for benefit of commonwealth; *Taylor v. Haygarth*, 14 Sim. 8, 6 L. T. N. S. 95; *Johnstone v. Hamilton*, 11 Jur. N. S. 777, 12 L. T. N. S. 822, 13 Week. Rep. 961; *Re Higginson* [1899] 1 Q. B. 325, 68 L. J. Q. B. N. S. 198, 79 L. T. N. S. 673, 47 Week. Rep. 285, 5 Manson, 289, 15 Times L. R. 135, holding chattels real or personal vested in a person as mere trustee upon private trusts which have failed are held by him as trustee for crown of bona vacantia.

**—Upon failure of charity because of mortmain.**

Distinguished in *Brook v. Badley*, L. R. 4 Eq. 106, where the question was whether a legacy charged on land was real property within the statute of mortmain.

**Right of executor in surplus of estate.**

Cited in *Hemphill v. Hamilton*, 11 Ark. 425, as to his being trustee for distributees.

Cited in note in 12 E. R. C. 28, on right of executors to residuary estate undisposed of by will.

**Disposition of property on failure of trust.**

Cited in *Elliott v. Morris*, Harp. Eq. 281, holding that if attempted trust fails, reversion is in favor of heirs and not of devisee in trust.



**Duties of trustees.**

Cited in *Hill v. Hill*, 79 N. J. Eq. 521, 82 Atl. 338, holding that trustee of estate must account for all profits made out of estate.

**Jurisdiction of equity.**

Cited in *Baker v. Biddle*, Baldw. 394, Fed. Cas. No. 764, on jurisdiction of equity.

8 E. R. C. 171, *BASKERVILLE'S CASE*, 7 Coke, 28a.

8 E. R. C. 174, *ROE EX DEM. JOHNSON v. IRELAND*, 11 East, 280, 10 Revised Rep. 504.

**Limitations or prescription against state.**

Cited in *United States v. Beebee*, 4 McCrary, 12, 17 Fed. 36, holding lapse of time may be a sufficient defense to a suit instituted in the name of the United States; *Hepburn's Case*, 3 Bland, Ch. 95, holding lapse of time is a defense available against state, and may be taken advantage of by it.

Cited in notes in 3 Eng. Rul. Cas. 33, on prescriptive right to ancient lights; 8 E. R. C. 178, on running of limitations against government.

**— Prescriptive grant.**

Cited in *Kinsell v. Daggett*, 11 Me. 309, as to whether a grant will be presumed against the state; *State v. Dickinson*, 129 Mich. 221, 88 N. W. 621, holding a grant of lands of which there is no direct evidence may be presumed from facts and circumstances, even as against the state; *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513, holding no right will be acquired as against the state by the obstruction of a public fishway, though continued for more than twenty years under a claim of right, if such obstruction originated without right; *State, Given, Prosecutor, v. Wright*, 41 N. J. L. 478, as to presumption of grant against the state by reason of adverse possession; *Gwathney v. Stump*, 2 Overt. (Tenn.) 308, to the point that grant from crown may be presumed after expiration of twenty years; *Fitzgerald v. Finn*, 1 U. C. Q. B. 70, holding a grantee of the crown may maintain ejectment against a person who has been in adverse possession of the land upwards of twenty years.

**Presumption of grant from occupation.**

Cited in *United States v. Devereux*, 61 U. S. App. 548, 32 C. C. A. 564, 90 Fed. 182, holding where a trustee to whom land was conveyed never took possession of the land, nor attempted to execute the trust in any manner until after the lapse of more than sixty years, during all of which time the land was held by others claiming title adversely, it will be presumed that title of such adverse claimants rested upon a grant; *McArthur v. Carrie*, 32 Ala. 75, 70 Am. Dec. 529, holding proof of uninterrupted adverse possession of personal property for twenty years raises a presumption of title and ownership; *Summer v. Child*, 2 Conn. 607, holding what circumstances furnish a presumption of a grant, is a matter of law; *Van Dolsen v. New York*, 21 Blatchf. 454, 17 Fed. 817; *Folsom v. Freeborn*, 13 R. I. 200,—as to when occupation raises presumption of grant; *Mitchel v. United States*, 9 Pet. 711, 9 L. ed. 283, holding that direct grant from crown of lands in royal haven may be presumed on uninterrupted possession of sixty years; *Davies v. Pettit*, 11 Ark. 349, to the point that grant of charter, which ought to be matter of record will be presumed, in favor of long possession; *Harrison v. Young*, 9 Ga. 359, holding that proof of seven years' regular and uninterrupted usage of public ferry is prima facie evidence of prescriptive right; *Lewis v. San Antonio*, 7 Tex. 288, holding possession of land

uninterrupted and exclusive, with the exercise of ownership for the term of twenty years, raises a presumption of a grant.

8 E. R. C. 181, *REX v. COTTON*, Parker, 112.

**Possession or title to support trover.**

Cited in *Whitley v. Roberts*, 9 E. R. C. 624, McClcl. & Y. 107-119, on possessory right of a tenant after distress.

Distinguished in *Corbett v. Shepard*, 4 U. C. C. P. 43, holding chattel mortgagor in possession has title to maintain trover.

**Crown seizure of one's goods in custody of law.**

Cited in *Giles v. Grover*, 11 E. R. C. 550, 1 H. L. Cas. 72, 9 Bing. 128, 2 Moore & S. 197, on conflict in right between Crown and subject to goods in custody of law.

**Subrogation to rights of Crown.**

Cited in note in 8 E. R. C. 199, on subrogation to rights of the Crown.

**Effect of execution upon title.**

Cited in *Folsom v. Chesley*, 2 N. H. 432, holding that mere seizure of property on execution does not divest title of judgment debtor.

**Priority between executions.**

Cited in note in 11 E. R. C. 621, on lien of execution and priority between executions.

8 E. R. C. 201, *REX v. DAVIES*, 2 Revised Rep. 683, 5 T. R. 626.

See S. C. 5 E. R. C. 543.

8 E. R. C. 205, *REX v. CAPPER*, 5 Price. 217, 19 Revised Rep. 568.

**Royal grants, how construed.**

Cited in *Gesner v. Gas Co.* 2 N. S. 72, holding royal grant is to be construed most strongly against grantee; *Colonial Bank v. Whinney*, L. R. 30 Ch. Div. 261, 55 L. J. Ch. N. S. 585, 53 L. T. N. S. 272, 33 Week. Rep. 852, as to grant of goods and chattels of felon not including choses in action.

Cited in note in 2 Eng. Rul. Cas. 764, on construing King's grant most strongly against grantee.

**Choses in action as goods and chattels.**

Cited in *Gillet v. Fairchild*, 4 Denio, 80, holding term embraces demands arising out of a tort; *Robertson v. Williams*, 18 N. S. 393, holding chose in action included under "goods and credits" of absconding debtor.

**Proprietary nature of "stocks."**

Cited in *Kilgour v. New Orleans Gaslight Co.* 2 Woods, 144, Fed. Cas. No. 7,764; *Huntzinger v. Philadelphia Coal Co.* 11 Phila. 609, 33 Phila. Leg. Int. 178,—holding shares of stock in corporation are personal property; *Cornick v. Richards*, 3 Lea, 1 (dissenting opinion); *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507; *O'Deady v. McLoughlin*, Newfoundl. Rep. (1884-96) 457; *Hall v. Bidwell*, 3 U. C. Q. B. O. S. 26,—as to it being a chose in action rather than chattel.

8 E. R. C. 233, *RE TUFNELL*, L. R. 3 Ch. Div. 164, 45 L. J. Ch. N. S. 731, 34 L. T. N. S. 838, 24 Week. Rep. 915.

**Power of dismissal of officers of state or Crown.**

Cited in *Reid v. United States*, 161 Fed. 469; *Skelton v. Newfoundland*, Newfoundl. Rep. (1884-96) 243,—holding they have no right of action for; *Grant*

v. India, L. R. 2 C. P. Div. 445, 46 L. J. C. P. N. S. 681, 37 L. T. N. S. 188, 25 Week. Rep. 848, 8 Eng. Rul. Cas. 246, holding Crown has absolute power to dismiss or retire any officer.

Cited in notes in 11 E. R. C. 699, on relationship between public officer and government; 15 E. R. C. 47, on removal of judges.

#### **Actions against crown.**

Cited in *Halifax City R. Co. v. R.* 2 Can. Exch. 433, holding no action in tort will lie.

8 E. R. C. 246, *GRANT v. SECRETARY OF STATE*, L. R. 2 C. P. Div. 445, 46 L. J. C. P. N. S. 681, 37 L. T. N. S. 188, 25 Week. Rep. 848.

#### **Dismissal of servants of crown.**

Cited in *Skelton v. Newfoundland*, *Newfound. Rep.* (1884-96) 243, holding they have no right of action for; *Mial v. Ellington* (*State ex rel. Mial v. Ellington*) 134 N. C. 131, 65 L.R.A. 697, 46 S. E. 961, holding that one appointed for definite time to legislative office has no vested property interest or right thereto of which legislature cannot deprive him.

Cited in notes in 1 E. R. C. 827, on nonactionable injuries done by official acts of government for India; 15 E. R. C. 47, on removal of judges.

#### **Defense that act was done in obedience to lawful command of Crown.**

Cited in *Milner v. Brydges*, 18 N. B. 113, holding defendant must plead it.

#### **Privilege of report of officer.**

Cited in note in 5 L.R.A.(N.S.) 166, on report by executive or administrative officer as privileged.

8 E. R. C. 268, *RE PERING*, 5 Dowl. P. C. 750, *Murph. & H.* 223, 2 Mees. & W. 873.

#### **Petition of right and prosecution thereof.**

Cited in *Briggs v. The Upper Cedar Point*, 11 Allen 157, on necessity of leave first obtained from sovereign and a designated court.

Cited in note in 21 E. R. C. 222, as to when petition of right will lie.

8 E. R. C. 275, *MOUNSEY v. ISMAY*, 3 Hurlst. & C. 486, 11 Jur. N. S. 141, 34 L. J. Exch. N. S. 52, 12 L. T. N. S. 27, 13 Week. Rep. 521.

#### **Easement acquired by Custom.**

Cited in *Stevens v. Dennett*, 51 N. H. 324, holding an easement will not arise from a use by license and indulgence; *Griffith v. Brown*, 26 Grant Ch. (U. C.) 503, holding a land owner by building a stairway at rear of his building but on another's land, does not acquire an easement by reason of user; *Mercer v. Denne* [1904] 2 Ch. 534 [1905] 2 Ch. 538, 68 J. P. 479, 53 Week. Rep. 55, 91 L. T. N. S. 513, 20 Times L. R. 609, 21 Times L. R. 760, 70 J. P. 65, 54 Week. Rep. 303, 3 L. G. R. 1293, holding a custom for fishermen to dry nets on land of a private owner is good; *Sowerby v. Coleman*, L. R. 2 Exch. 96, 36 L. J. Exch. N. S. 57, 15 L. T. N. S. 667, 15 Week. Rep. 451, holding a custom of inhabitants of one parish to exercise horses in a place within another parish cannot be shown.

Cited in notes in 10 E. R. C. 10, on distinction between easements and rights given by custom; 15 E. R. C. 556, on effect of custom as to tenant's rights in waygoing crop.

**Inference drawn from twenty year's user.**

Cited in *Crowe v. Cabot*, 40 N. S. 177, holding any inference of an easement in light for twenty years may be rebutted and disproved.

**Right to tack on previous enjoyment.**

Cited in *McGee v. R.* 7 Can. Exch. 309, holding a party claiming an easement may rely upon the enjoyment by previous occupiers, so long as there has been no interruption of the enjoyment.

**Application of prescriptive act to prescriptive rights in gross.**

Cited in *Grand Hotel Co. v. Cross*, 44 U. C. Q. B. 153, holding prescriptive rights in gross are not within the provisions of the prescription act.

**Rights included in "Rights of Common."**

Cited in *Fraser v. Pere Marquette R. Co.* 18 Ont. L. Rep. 589, holding only those usual rights of common and profits a prendre which are in some way appurtenant to the land and limited to the wants of the dominant tenant, are included in "right of common."

8 E. R. C. 281, *BRYANT v. FOOT*, 37 L. J. Q. B. N. S. 217, 18 L. T. N. S. 578, 16 Week. Rep. 808, L. R. 3 Q. B. 497, 9 Best & S. 444, affirming the decision of the Court of Queen's Bench, reported in 36 L. J. Q. B. N. S. 65, L. R. 2 Q. B. 161.

**Nature of proof of custom.**

Cited in *Grand Hotel Co. v. Cross*, 44 U. C. Q. B. 153, on proof of custom where there is no time immemorial on which to found it.

**Presumption from lapse of time.**

The decision of the Queen's Bench was cited in *Jersey City v. Jersey City & B. R. Co.* 70 N. J. L. 360, 57 Atl. 445, holding a claim long dormant is merely a presumption of release capable of being rebutted by circumstances showing that it ought not to prevail; *State, Givin, Prosecutor, v. Wright*, 41 N. J. L. 478, holding that uninterrupted annual payment of taxes upon land after such tax was declared illegal as being made upon exempt land, raises presumption that new agreement was made.

**Right to claim a reasonable fee by prescription.**

Cited in *Lawrence v. Hitch*, L. R. 3 Q. B. 521, 9 Best & S. 467, 37 L. J. Q. B. N. S. 209, 18 L. T. N. S. 483, 16 Week. Rep. 813, on application of doctrine of rankness to a toll from time immemorial.

The decision of the Queen's Bench was criticised in *Mills v. Colchester*, L. R. 2 C. P. 476, 36 L. J. C. P. N. S. 210, 16 L. T. N. S. 626, 15 Week. Rep. 955, holding fact that fee alleged to have been paid was not a fixed fee but a reasonable amount is not objectionable if the custom is not otherwise objectionable.

**Foundation to rights in fees for performing marriages.**

Cited in *Kirton v. Dear*, L. R. 5 C. P. 217, 1 Hopw. & C. 349, 39 L. J. C. P. N. S. 36, 21 L. T. N. S. 532, 18 Week. Rep. 144, holding fees in respect of marriages, baptisms, and churchings performed in church, can only be claimed by custom, unless given by act of Parliament.

8 E. R. C. 305, *FITCH v. RAWLING*, 2 H. Bl. 393, 3 Revised Rep. 425.

**Customary rights of common or easement.**

Cited in *Hall v. Nottingham*, L. R. 1 Exch. Div. 1, 45 L. J. Exch. N. S. 50, 33 L. T. N. S. 697, 24 Week. Rep. 58, upholding custom for the inhabi-



tants of a parish to use of another's freehold for recreation: *Mercer v. Denne* [1904] 2 Ch. 534 [1905] 1 Ch. 538, 68 J. P. 479, 53 Week. Rep. 55, 91 L. T. N. S. 513, 20 Times L. R. 609, 21 Times L. R. 760, 70 J. P. 65, 54 Week. Rep. 303, 3 L. G. R. 1293, holding a custom for fishermen to dry their nets on another's land may be established by user; *Pearsall v. Post*, 20 Wend. 111, holding that user by the public cannot be urged as foundation of legal presumption of a grant.

Cited in notes in 8 E. R. C. 331, on necessity that custom be limited, certain, reasonable, and of lawful origin; 8 Eng. Rul. Cas. 348, on right to claim profit in land of another by custom or otherwise; 10 Eng. Rul. Cas. 272, on apportionability of common appurtenant on alienation of fee of part of the land to which the right appertains; 12 E. R. C. 549, on necessity of termini of way by prescription.

Cited in 3 *Farnham, Waters*, 2320, on how far permission to burden land creates an estate; *Gray, Perpet.* 2d ed. 443, on exemption of customary rights from rule against perpetuities.

#### — Who may acquire.

Cited in *Grand Hotel Co. v. Cross*, 44 U. C. Q. B. 153, holding there can be no rights secured in the waters of a spring by reason of use by the public at large; *Albright v. Cortright*, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634, holding a custom laid in the whole public would be so general as to be indistinguishable from the law itself; *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718, holding a right so general and unqualified cannot exist in the soil of a private proprietor, either by custom or prescription; *Post v. Pearsall*, 22 Wend. 425 (affirming 20 Wend. 111), holding the public cannot gain prescriptive rights against will of owner by reason of a continuous use of land as a public landing for more than twenty years; *Warrick v. Queen's College*, L. R. 10 Eq. 105, holding a right to the use of a commons may be proved as a custom belonging to the inhabitants of a place; *Bourke v. Davis*, L. R. 44 Ch. Div. 110, 62 L. T. N. S. 34, 38 Week. Rep. 167, holding it must be restricted to the inhabitants of a particular district; *Edwards v. Jenkins* [1896] 1 Ch. 308, 65 L. J. Ch. N. S. 222, 73 L. T. N. S. 574, 44 Week. Rep. 407, 60 J. P. 167, holding a custom laid in the inhabitants of several parishes is bad; *R. v. Ecclesfield*, 12 E. R. C. 671, 1 Barn. & Ald. 348, 19 Revised Rep. 335, on the customary rights of inhabitants of localities in private lands.

Distinguished in *Perley v. Langley*, 7 N. H. 233, holding the inhabitants of a town cannot remove the soil, or take profits from the soil of another, as a custom; *Hill v. Lord*, 48 Me. 83, holding they cannot acquire the right to take sea weed.

#### Strangers to custom.

Cited in *London v. Cox*, L. R. 2 H. L. 239, 36 L. J. Exch. N. S. 225, 16 Week. Rep. 44, holding custom of foreign attachment cannot apply to debts or garnishees out of the jurisdiction.

#### Right of two or more defendants to unite in the general issue and sever on special pleas.

Cited in *Shore v. Shore*, 2 U. C. Q. B. O. S. 65, holding two defendants in action for assault and battery may unite in the general issue and sever on subsequent special pleas of justification.

8 E. R. C. 311, *WILSON v. WILLES*, 7 East, 121, 8 Revised Rep. 604, 3 Smith, 167.

**Customary rights of common or easement.**

Cited in notes in 8 E. R. C. 333, on necessity that custom be limited, certain, reasonable, and of lawful origin; 10 Eng. Rul. Cas. 272, on apportionability of common appurtenant on alienation of fee of part of the land to which the right appertains.

Cited in 2 Washburn, Real. Prop. 6th ed. 348, on customary rights of common.

**Right to take a profit a prendre by custom.**

Cited in *Delaplane v. Crenshaw*, 15 Gratt. 457, holding a custom to take or have anything from another's land, or for a profit a prendre, is bad; *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718, holding the right in the public to fish and carry away at will is a right so universal and unqualified that it cannot exist in the soil of a private proprietor.

**— Taking away soil.**

Cited in *Clayton v. Corby*, 1 U. C. Q. B. O. S. 78, holding a claim of right to take away clay in such quantities and at such times as required for purpose of making bricks in his kiln is too indefinite.

Distinguished in *Hall v. Byron*, 4 Ch. Div. 667, 46 L. J. Ch. N. S. 297, 36 L. T. N. S. 367, 25 Week. Rep. 317, holding the lord may take loam, turf, or subsoil from the commons for use or sale so long as rights of commoners are not infringed upon.

8 E. R. C. 316, *TYSON v. SMITH*, 9 Ad. & El. 466, 1 Perry & D. 307, affirming the decision of the Court of Queen's Bench, reported in 6 Ad. & El. 745, 6 L. J. K. B. N. S. 189, 1 Nev. & P. 784.

**Customary rights of common or easement.**

Cited in note in 10 E. R. C. 272, on apportionability of common appurtenant on alienation of fee of part of the land to which the right appertains.

Cited in *Gray, Perpet.* 2d ed. 443, 444, on exemption of customary rights from rule against perpetuities.

**Reasonableness as an element in a custom.**

Cited in *Knowles v. Dow*, 22 N. H. 387, 55 Am. Dec. 163, holding a custom in the inhabitants of a village of hauling sea-weed upon the close of an owner and afterwards hauling it away at pleasure is not void as being unreasonable; *Mills v. Colchester*, L. R. 2 C. P. 476, on the necessity of reasonableness in a custom to use another's property.

**Necessity of a restricted use to found custom.**

Cited in *Mercer v. Denne* [1904] 2 Ch. 534 [1905] 2 Ch. 538, 68 J. P. 479, 53 Week. Rep. 55, 91 L. T. N. S. 513, 20 Times L. R. 609, 21 Times L. R. 760, 70 J. P. 65, 54 Week. Rep. 303, 3 L. G. R. 1293, upholding as a legal custom a custom of fishermen of a parish to dry fishing nets on the land of a private owner.

**— Question of fact as to reasonableness.**

Cited in *Bradburn v. Foley*, L. R. 3 C. P. Div. 129, 47 L. J. C. P. N. S. 331, 38 L. T. N. S. 421, 26 Week. Rep. 423, holding the reasonableness or unreasonableness of a custom is a question of law for the court.

**Who may claim under custom.**

Cited in *London v. Cox*, L. R. 2 H. L. 239, 36 L. J. Exch. N. S. 225,

16 Week. Rep. 44, holding a custom of foreign attachment cannot in reason apply to debts or garnishees out of the jurisdiction.

Distinguished in *Sowerby v. Coleman*, L. R. 2 Exch. 96, 36 L. J. Exch. N. S. 57, 15 L. T. N. S. 667, 15 Week. Rep. 45, holding a custom for inhabitants of one parish to train horses at all seasonable times within limits of another parish is bad.

The decision of the Queen's Bench was cited in *Stevens v. Dennett*, 51 N. H. 324, holding evidence of a use for sixty years by the public in a spring is irrelevant in support of a claim founded solely upon an easement appurtenant to the estate and possession of another.

8 E. R. C. 337, *CONSTABLE v. NICHOLSON*, 14 C. B. N. S. 230, 32 L. J. C. P. N. S. 240, 11 Week. Rep. 698.

#### **Customary rights of common or easement.**

Cited in *Gray. Perpet.* 2d ed. 444, on exemption of customary rights from rule against perpetuities; 2 Washburn, *Real Prop.* 6th ed. 275, on distinction between easements and commons; 2 Washburn, *Real Prop.* 6th ed. 306, on power of public to acquire prescriptive right to easement.

#### **Right to claim profit in another's land by custom.**

Cited in *Saltash v. Goodman*, L. R. 5 C. P. Div. 431, holding the right to dredge for oysters and carry away oysters at will cannot be set up by custom because it is a profit in alieno solo; *Rivers v. Adams*, L. R. 3 Exch. Div. 361, 48 L. J. Exch. N. S. 47, 39 L. T. N. S. 39, 27 Week. Rep. 381, holding there can be no right to cut underwood and carry away for fuel in the inhabitants of a parish by custom as the right is a profit a prendre in the soil; *Goodman v. Saltash*, L. R. 7 App. Cas. 633, 52 L. J. Q. B. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 293, 47 J. P. 276 (dissenting opinion), on right in the inhabitants to fish by custom; *Hough v. Clark*, 23 Times L. R. 682, 5 L. G. R. 1195, holding a right to take gravel from bed of a stream without stint is claiming a profit a prendre in alieno solo and cannot be upheld.

Cited in note in 10 E. R. C. 249, 252, on validity of claim by custom to enjoy a profit a prendre in soil of another.

#### **Right to an unrestricted public use by custom.**

Cited in *Albright v. Cortright*, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634, holding the public cannot have any right to fish founded upon custom, however long the practice has continued; *Albright v. Lake & Park Commission*, 68 N. J. L. 523, 53 Atl. 612, holding a prescription laid in a body politic or corporate is good and will justify a user of the right by any member of the corporation.

Cited in notes in 45 L.R.A. 241, on title to land between high and low water mark; 23 E. R. C. 791, on prescriptive right to take seaweed, etc.

8 E. R. C. 349, *YATES v. PYM*, 2 Marsh. 141, 16 Revised Rep. 653, 6 Taunt. 446, affirming the decision of Heath, J., reported in Holt, N. P. 95.

#### **Warranties on sale of goods.**

Cited in *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 57 C. C. A. 498, 120 Fed. 906, holding that implied warranty existed that all oil purchased would be same as tested sample and fit for purpose for which it was intended to be used.

Cited in 1 Beach, Contr. 325, on statements in catalogues as warranties; 1 Beach, Contr. 328, on construction of warranties; 2 Mechem, Sales, 1071, on what constitutes an express warranty.

#### **Warranty of quality from description in bill of sale.**

Cited in *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317, holding, if the bill of parcels be "the written evidence of the contract," a description of an item as "winter pressed oil" would be a warranty that it was such; *Hensha v. Robins*, 9 Met. 83, 43 Am. Dec. 367, holding the description contained in a bill of parcels of goods sold imports a warranty that the goods are the goods described and that they substantially agree with the terms of the description; *Hart v. Wright*, 17 Wend. 267, on implied warranty from description in sale bill; *Hobart v. Young*, 63 Vt. 363, 12 L.R.A. 693, 21 Atl. 612, holding a description of horses in the bill of sale, as "sound and kind" is a warranty; *Kellogg v. Hyatt*, 1 U. C. Q. B. 445, holding where vendor describes hams as good and that they would keep a year, an express warranty results; *Bain v. Gooderham*, 15 U. C. Q. B. 33, holding flour guaranteed to be "No 1 superfine" must be sweet of that grade.

#### **Right of vendee to show inferiority of goods in action for purchase price.**

Cited in *Hall v. Coleman*, 3 U. C. Q. B. O. S. 39, holding where vendor brings his action for the stipulated price it should be allowed the purchaser to prove the inferiority of the article, in diminution of damages.

#### **Custom against law or terms of contract.**

Cited in *Atkinson v. Allen*, 29 Ind. 375; *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. 609,—holding the usage must not conflict with settled rules of law, nor go to defeat the essential terms of the contract; *Hearne v. New England Mut. M. Ins. Co.* 20 Wall. 488, 22 L. ed. 395, 7 Legal Gaz. 57; *Tilley v. Cook County*, 103 U. S. 155, 26 L. ed. 374,—holding the evidence of custom must not be repugnant to or inconsistent with the contract; *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534, to the point that usage or custom may not contradict positive stipulations in written contract; *Gilbert v. McGinnis*, 114 Ill. 28, 28 N. E. 382, holding that where contract is ambiguous particular custom of trade known to parties or which they are presumed to know, is admissible to enable court to arrive at intention of parties; *Fletcher v. St. Louis Marine Ins. Co.* 18 Mo. 193, holding inadmissible a custom that landing a part of the cargo is the landing of the whole; *Brown v. Brooks*, 25 Pa. 211, holding that if words used in contract be technical, parol evidence is admissible to explain meaning by usage; *R. B. Gage Mfg. Co. v. Woodward*, 17 R. I. 464, 23 Atl. 16, holding evidence of trade custom is not admissible where terms of contract are clear, definite and unequivocal; *Catlin v. Smith*, 24 Vt. 85, holding that consignee of goods to be sold for cash cannot show that sale of such goods to be paid for "in a few days" was for cash according to custom; *Leach v. Beardslee*, 22 Conn. 404, holding usage cannot control or vary clear and unequivocal stipulations of the contract, but will be controlled by them; *Miller v. Moore*, 83 Ga. 684, 6 L.R.A. 374, 20 Am. St. Rep. 329, 10 S. E. 360, holding the custom binding upon those who adopt it for their own dealings, but persons who have not are entitled to stand on the general law; *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536, holding a written and express contract cannot be controlled or varied or contradicted by a usage or custom; *Reid v. Diamond Plate Glass Co.* 129 C. C. A. 110, 54 U. S. App. 619, 85 Fed. 193, on parol evidence to vary writing; *Barry v. Morse*, 3 N. H. 132, holding



no evidence of usage can be admitted where the legal effect of an instrument, or of terms used in it, has been settled; *Sewall v. Gibbs*, 1 Hall, 602, holding that usage of trade cannot be set up to vary terms of written contract; *Snowden v. Warder*, 3 Rawle, 101, holding that evidence is admissible to prove, that by custom or usage, in Philadelphia, on purchase and sale of cotton, vendor shall answer for any latent defect in article sold.

Cited in notes in 8 E. R. C. 357, on right to contradict terms of express contract by custom or otherwise; 11 E. R. C. 223, on parol evidence to contradict written instrument.

Cited in 1 Beach, Contr. 926, on right to vary plain terms of contract by custom.

#### — To overcome warranty or description in sale.

Cited in *Hardy v. Fairbanks*, 2 N. S. 432; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321,—holding no custom in the sale of any particular description of goods can be admitted to control the general rules of law.

Cited in *Benjamin, Sales*, 5th ed. 661, on interpretation of express warranties by usage of trade; 2 *Mechem, Sales*, 1099, on express warranty as excluding usage.

#### Effect of delay in discovering defects on remedy of purchaser.

Cited in *Gordon v. Waterous*, 36 U. C. Q. B. 321, holding that delay in testing goods purchased according to contract will not preclude buyer from taking advantage of breach of warranty, where the delay was not unreasonable.

#### Demurrage.

Cited in note in 41 L. ed. U. S. 937, on demurrage.

8 E. R. C. 351, *THE ALHAMBRA*, 4 Asp. Mar. L. Cas. 410, 50 L. J. Prob. N. S. 36, L. R. 6 Prob. Div. 68, 29 Week. Rep. 655, reversing the decision of the Admiralty Division, reported in L. R. 5 Prob. Div. 256, 49 L. J. Prob. N. S. 73, 43 L. T. N. S. 31.

#### Admissibility of custom in construction of charter party.

Cited in *Menneke v. Cargo of Java Sugar*, 187 U. S. 248, 47 L. ed. 163, 23 Sup. Ct. Rep. 86, holding where custom sought to be shown would controvert the express terms of the charter party it is not admissible.

Cited in note in 14 E. R. C. 668, on parol evidence as to usage in interpretation of written contracts.

#### — As to what is "safe port."

Cited in *Reynolds v. Tomlinson* [1896] 1 Q. B. 586, 65 L. J. Q. B. N. S. 496, 74 L. T. N. S. 591, 8 Asp. Mar. L. Cas. 150; *The Gazelle*, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139,—holding evidence of a custom to consider as safe a particular port, which in fact is not reasonably safe would be incompetent as contradicting a charter party requiring entrance at a safe port.

Cited in *Hughes*, Adm. 162, on meaning of term "safe port."

Distinguished in *The Gazelle*, 5 *Hughes*, 391, 111 Fed. 429, holding under language of charter "to a safe Danish port, or as near thereunto as she can safely get, and always lay and discharge afloat" custom is admissible to show a discharge at any safe port is all that is required.

#### Meaning of "port."

Cited in *The Antonio Zambrana*, 70 Fed. 320, holding it must be a real and existing port, within the recognition of mariners, and of maritime usage.

Criticized in *Horsley v. Price*, L. R. 11 Q. B. Div. 244, 52 L. J. Q. B. N. S. 603, 49 L. T. N. S. 101, 31 Week. Rep. 786, 5 Asp. Mar. L. Cas. 106, holding where charter party called for an unloading at S. or "as near thereto as she may safely go at all times of tide and always afloat" it cannot be held that this means a point within the ambit of the port named.

8 E. R. C. 360, *KEYSE v. KEYSE*, 55 L. J. Prob. N. S. 54, L. R. 11 Prob. Div. 100, 34 Week. Rep. 791.

#### **Damages as compensation.**

Cited in note in 8 E. R. C. 370, on award of damages by way of compensation.

8 E. R. C. 363, *SEARS v. LYONS*, 2 Starkie, 317, 20 Revised Rep. 688.

#### **Damages as compensation.**

Cited in note in 8 E. R. C. 371, 375, 378, on award of damages by way of compensation.

#### **Right to recover punitive damages.**

Cited in *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, on recovery of punitive damages in a tort action; *Burnett v. Ward*, 42 Vt. 80, to the point that exemplary damages may be recovered in action where malicious intent is shown; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, on basis for the allowance of punitive damages.

#### **—Actions of trespass.**

Cited in *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39, holding exemplary damages may be recovered from a common carrier for the gross insult to a passenger by a brakeman retained by the company after the misconduct is known; *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149, holding such damages are recoverable in an action of trespass to real estate under circumstances of malice such as would warrant recovery in other actions.

#### **—Admissibility of evidence of intent.**

Cited in *Colby v. Jackson*, 12 N. H. 526, holding evidence admissible to prove absence of malicious intent attending a false imprisonment; *Jeffers v. Markland*, 5 U. C. Q. B. O. S. 677, holding the jury may consider the intention with which the act is done, whether for insult or for injury, or for both, and give their verdict accordingly; *Short v. Lewis*, 3 U. C. Q. B. O. S. 385, holding evidence tending to show provocation admissible in reduction of verdict for assault and battery; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79, holding evidence of extreme recklessness and malice, admissible as affecting the question of damages though it did not prove any special malice toward the one actually injured; *Anthony v. Gilbert*, 4 Blackf. 348, holding it proper for the jury to take into consideration all the circumstances, and award in addition to the actual loss, such exemplary damages as shall tend to prevent a repetition of the injury.

#### **Liability for killing trespassers by dangerous instruments.**

Cited in note in 29 L.R.A. 156, on liability for killing or injuring trespassers by means of dangerous instruments.

S E. R. C. 364, EMBLEM v. MYERS, 6 Hurlst. & N. 54, 30 L. J. Exch. N. S. 71, 2 L. T. N. S. 774, 8 Week. Rep. 665.

**Right of recovery of exemplary damages for tort done with aggravation or malice.**

Cited in *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39, holding exemplary damages are recoverable from railroad company which condones the act of its brakeman in grossly insulting a passenger; *Stowe v. Heywood*, 7 Allen, 118, holding when the insult and indignity are connected with an actionable injury, they aggravate it, and are an element of recoverable damages; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 494, 7 Am. Rep. 699, holding that punitive damages may be awarded where fraud, malice, gross negligence or willfulness is proven; *Silver v. Kent*, 60 Miss. 124, holding when the injury is oppressively and wilfully inflicted, the party may recover for all actual, though remote losses sustained; *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501, holding where a trespass is accompanied with malice a recovery may be had of exemplary damages in excess of actual injuries; *Baldwin v. New York & H. Nav. Co.* 4 Daly, 314, holding that exemplary damages could not be given, where it appeared that accident was due to negligence of deck hand in pulling in plank without observing that plaintiff was on it; *Saunders v. Gilbert*, 156 N. C. 463, 38 L.R.A.(N.S.) 404, 72 S. E. 610, holding that punitive damages may be awarded against member of mob who assists in forcing person to seek refuge in his own house by threats and hostile demonstration; *Clissold v. Machell*, 25 U. C. Q. B. 80, holding that in action for false imprisonment against justice exemplary damages may be given where defendant used insulting expressions to plaintiff during examination; *Clarke v. Fullerton*, 8 N. S. 348, holding in actions of tort where fraud or wilful wrong has marked party's conduct, exemplary damages may be given; *Clissold v. Machell*, 26 U. C. Q. B. 422 (affirming 25 U. C. Q. B. 80), holding the court justified in telling the jury they might give exemplary damages where insulting remarks were made; *Bell v. Midland R. Co.* 30 L. J. C. P. N. S. 273, 10 C. B. N. S. 287, 7 Jur. N. S. 1200, 4 L. T. N. S. 293, 9 Week. Rep. 612, holding where a party persists in acts for the purpose of destroying another's business and securing gains to himself damages of an exemplary character are allowable.

Cited in 6 *Thompson*, Neg. 248, on effect of motive on liability for exemplary damages.

Criticized in *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, on distinction between actual and exemplary damages.

Disapproved in *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526, holding under the statutes only actual damages are recoverable by reason of negligence.

**— Malicious eviction from premises.**

Cited in *Thompson v. Hill*, L. R. 5 C. P. 564, 39 L. J. C. P. N. S. 264, 22 L. T. N. S. 820, 18 Week. Rep. 1070, holding where one is turned out of his house by acts making it inconvenient to live in it, a verdict for more than actual loss of business will not be held excessive.

**Damages for loss of property.**

Cited in *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, holding the doctrine of compensation affords the only true measure of damages.

Cited in note in S E. R. C. 371-373, 375, on award of damages by way of compensation.

Distinguished in *Jackson v. McLellan*, 19 U. B. 432, holding interest on the value of a ship lost by collision is not recoverable as part of damages.

—**For withdrawal of lateral support.**

Cited in *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454, holding the measure of damage for gross carelessness in removal of lateral support to land will not include wounded feelings.

8 E. R. C. 382, *LYNCH v. KNIGHT*, 9 H. L. Cas. 577, 8 Jur. N. S. 724, 5 L. T. N. S. 291.

**Mental suffering as ground for recovery of damages.**

Cited in *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278; *Western U. Teleg. Co. v. Wood*, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; *Rowan v. Western U. Teleg. Co.* 149 Fed. 550,—holding mental suffering, unaccompanied with bodily injury, is too intangible and too remote to form a basis for the recovery of damages; *Butner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087; *Chase v. Western U. Teleg. Co.* 10 L.R.A. 464, 44 Fed. 554; *Connelly v. Western U. Teleg. Co.* 100 Va. 51, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618,—holding an action for mental suffering will not lie for negligent failure to deliver a message promptly, unless special damages are shown; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295, holding same where not accompanied by any pecuniary loss or physical injury; *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A.(N.S.) 159, 104 S. W. 551, holding mental anguish and humiliation, unaccompanied by physical injury are not ground for a recovery of damages; *Larson v. Chase*, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, holding the correct ground for rule that no recovery can be had for mental suffering alone, is that the mental suffering was not the direct and proximate effect of the wrongful act; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434, holding a recovery for mental suffering not caused by injury to the person, property or reputation is not within the scope of legal procedure; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Spohn v. Missouri P. R. Co.* 116 Mo. 617, 22 S. W. 690; *Wileox v. Richmond & D. R. Co.* 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264,—holding mental pain alone, cannot sustain an action, where caused by simple negligence and unattended by injury to the person; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345, holding such action would not lie at common law, except in case of breach of marriage contract; *Peay v. Western U. Teleg. Co.* 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Western U. Teleg. Co. v. Ferguson*, 26 Ind. App. 213, 59 N. E. 416,—holding there can be no recovery where the basis of the action is mental anguish alone by reason of failure to deliver telegram; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419,—holding mere fright is not a subject of damages; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340, 29 W. N. C. 248, holding mere fright resulting from a train wreck, where unaccompanied by some physical injury,



will not sustain an action for damages; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990, holding that in action for damages caused by defective sidewalk evidence tending to show extent of injury and mental and bodily suffering was admissible; *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738, holding mental suffering is properly included in damages for a personal injury; *Western U. Teleg. Co. v. Ford*, 8 Ga. App. 514, 70 S. E. 65, holding that mental and physical suffering resulting from bodily injury may be considered as element of damages, when such suffering is proximate result of failure to deliver telegram; *Western U. Teleg. Co. v. Chouteau*, 28 Okla. 664, 49 L.R.A.(N.S.) 664, 115 Pac. 879, Ann. Cas. 1912D, 824, holding that in absence of statute, damages are not recoverable for mental distress alone, caused by negligent delay in delivering telegram; *Toms v. Toronto R. Co.* 22 Ont. L. Rep. 204, holding that damages may be allowed for injury from mental shock, when such shock is produced by physical injury; *Wilkinson v. Downton* [1897] 2 Q. B. 57, 66 L. J. Q. B. N. S. 493, 76 L. T. N. S. 493, 45 Week. Rep. 525, holding mental suffering and illness resulting from false message that plaintiff's husband was injured in accident and she must hasten to him will support an action for damages; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574 (dissenting opinion), on mental suffering alone as an element of damages.

Cited in note in 62 L.R.A. 720, on effect of bad motive to make actionable an injury to person or feelings.

Cited in 1 Kinkad, Torts, 546, as to whether negligence causing fright or mental suffering is actionable.

Distinguished in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1, holding a recovery *ex contractu* or *ex delicto* may be had for mental suffering caused by failure to deliver a telegram.

#### — In actions for defamation.

Cited in *Kester v. Western U. Teleg. Co.* 55 Fed. 603, holding in slander and libel the action cannot be founded solely on mental suffering; *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 974, 140 S. W. 661, Ann. Cas. 1913B, 1151, holding that alleged loss of society because of being charged with being negro does not render words actionable slander; *Butler v. Hoboken Printing & Pub. Co.* 73 N. J. L. 45, 62 Atl. 272, holding neither mental suffering nor physical sickness alone will support an action for damages for alleged slander or libel; *Dwyer v. Meehan, Jr.* L. R. 18 C. L. 138, on damages which are the natural and probable result of spoken words.

#### Actionable defamation.

Cited in *Reid v. Providence Journal Co.* 20 R. I. 120, 37 Atl. 637, holding words not in nature defamatory, if false and malicious and used by one who knows that special damages will follow, may be ground for recovery of special damages; *Henry v. Cherry*, 30 R. I. 13, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 73 Atl. 97, 18 Ann. Cas. 1006, holding that there is no common law right of privacy which will give right of action for publication of photograph of plaintiff unless special damage is shown; *Chamberlain v. Boyd*, L. R. 11 Q. B. Div. 407, 52 L. J. Q. B. N. S. 277, 48 L. T. N. S. 328, 31 Week. Rep. 572, 47 J. P. 372, holding a defamatory statement that party's conduct was so bad that he was all but dismissed from a club, by reason of which he was denied membership in another club will not support an action for damages; *Morasse v. Brochu*, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St.

Rep. 474, 25 N. E. 74, holding an imputation for the express purpose of injuring one in his profession and which actually does is actionable whether defamatory or not: *W. v. A.* 13 B. C. 333, holding the imputing of non-criminal bestiality to one holding the office of German Consul, is actionable without proof of special damages; *Miller v. David*, L. R. 9 C. P. 118, 43 L. J. C. P. N. S. 84, 30 L. T. N. S. 58, 22 Week. Rep. 332, on liability where words spoken are not in themselves actionable or defamatory.

Cited in note in 9 E. R. C. 10, on distinction between libel and slander.

Cited in 1 Cooley, Torts, 3d ed. 399, on words not actionable per se.

#### **—Words derogatory to woman.**

Cited in *Mehrhoff v. Mehrhoff*, 26 Fed. 13, holding words charging wife with telling false stories to husband and unwillingness to do housework are not sufficient to base an action for damages.

#### **—Aspersions on chastity of woman.**

Cited in *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308, holding spoken words charging a woman with fornication are not actionable per se where fornication is not made an indictable offense; *Hemming v. Elliott*, 66 Md. 197, 7 Atl. 110, holding in absence of statute, no words of mouth imputing the want of chastity to a female will support an action for slander; *Cooper v. Seaverns*, 81 Kan. 267, 25 L.R.A.(N.S.) 517, 135 Am. St. Rep. 359, 105 Pac. 509, holding that spoken words imputing unchastity to female are actionable without allegation of special damages; *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140, holding words charging a married woman with being a prostitute are actionable by reason of statute making the act an indictable offense.

Cited in note in 24 L.R.A.(N.S.) 602, on slander and libel in charging woman with unchastity.

Criticized in *Battles v. Tyson*, 77 Neb. 563, 24 L.R.A.(N.S.) 577, 110 N. W. 299, 15 Ann. Cas. 1241, holding a charge that a woman was a lewd character and entertained and drank whiskey with men in her room is actionable per se.

#### **Loss of consortium as special damage from defamation.**

Cited in *Case v. Case*, 45 Neb. 493, 63 N. W. 867, holding the charging of the injured party with adultery constitutes a proper element of damages where it results in alienation of husband's affections; *Ludlow v. Batson*, 5 Ont. L. Rep. 309, holding abandonment by wife and a boarder by reason of defamatory words, implying that plaintiff had defrauded by means of a fictitious account, is not such special damage as will support action; *Palmer v. Solmes*, 30 U. C. C. P. 481, holding loss of consortium vicinorum is not sufficient special damage to make words charging a man with incest actionable; *Campbell v. Campbell*, 25 U. C. C. P. 368, on loss of consortium as a sufficient allegation of special damages; *Palmer v. Solmes*, 45 U. C. Q. B. 15, holding loss by wife of the consortium of the husband is sufficient as special damage in action by wife for slander in imputing she had committed incest and adultery; *Roberts v. Roberts*, 8 E. R. C. 395, 33 L. J. Q. B. N. S. 249, 5 Best & S. 384, 10 Jur. N. S. 1027, 10 L. T. N. S. 602, 12 Week. Rep. 909, on loss of consortium as actionable damages.

Cited in note in 8 Eng. Rul. Cas. 404, on loss of consortium as special damage.

Distinguished in *Tasker v. Stanley*, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417, holding true statements and honest advice may be shown in defense to an action for procuring and enticing a wife to live separate from the husband; *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605,

77 N. E. 890, 6 Ann. Cas. 658, holding by the marriage contract each spouse is entitled to the conjugal society and comfort of the other; *Davies v. Solomon*, L. R. 7 Q. B. 112, 41 L. J. Q. B. N. S. 10, 25 L. T. N. S. 799, 20 Week. Rep. 167, holding loss of cohabitation with her husband and of the hospitality of her friends by reason of charging want of chastity will support an action of slander.

#### **Right to maintain action for loss of consortium.**

Cited in *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847; *Bassett v. Bassett*, 20 Ill. App. 543; *Haynes v. Nowlin*, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; *Jaynes v. Jaynes*, 39 Hun. 40; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17,—holding the wife has such a legal right to the conjugal society of her husband that she may recover against one depriving her of that right; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99, holding a divorced wife may maintain such action; *Clow v. Chapman*, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328, holding the enabling statutes of state give the wife an action against third persons for the alienation of the affections of her husband, and depriving her of his society; *Hodge v. Wetzler*, 69 N. J. L. 490, 55 Atl. 49, holding no action lies for loss of the society and comfort of the husband against one who has caused the alienation of his affections; *Beach v. Brown*, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46, holding the wife is entitled to the society and protection of her husband and she may maintain an action for damages for alienation of his affections, in her own name; *Lellis v. Lambert*, 24 Ont. App. Rep. 653, holding the wife has no right of action against a woman for criminal conversation with her husband and for alienation of his affections; *Clark v. Harlan*, 1 Cin. Sup. Ct. Rep. 418, holding a married woman has no cause of action against one who entices away her husband; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, holding an action will lie in favor of a wife for loss of conjugal society against one who wrongfully induces husband to abandon her; *Flandermeyer v. Cooper*, 85 Ohio St. 327, 40 L.R.A.(N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983, holding that either husband or wife may maintain action against anyone who wrongfully interferes with marital relationship; *Duffies v. Duffies*, 76 Wis. 374, 8 L.R.A. 420, 20 Am. St. Rep. 79, 45 N. W. 522, holding no action lies in wife's favor for loss of husband's society and support, either at common law or by statute law of state; *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961, holding the wife has no right to sue for interruption or loss of consortium with her husband; *Quick v. Church*, 23 Ont. Rep. 262, holding that action at common law lies against woman for enticing away plaintiff's husband.

Cited in note in 4 L.R.A.(N.S.) 644, on wife's right under enabling act to sue for alienation of affections.

Cited in 1 Cooley, Torts, 3d ed. 475, on action by wife for alienation of husband's affections.

Limited in *Baker v. Baker*, 16 Abb. N. C. 293, holding the wife cannot maintain an action against one enticing away her husband, or depriving her of his society.

Criticized in *Quick v. Church*, 23 Ont. Rep. 262, holding in such case the wife has an action at the common law against such woman; *Crocker v. Crocker*, 98 Fed. 702, holding no action lies, under Massachusetts's laws, for alienation of husband's affections in favor of wife.

### —In wife's name.

Cited in *Wolf v. Frank*, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132, holding in an action for alienation of the husband's affections the damages for the injury must be solely to wife and the suit could be maintained in her name at common law: *Sims v. Sims*, 79 N. J. L. 577, 29 L.R.A.(N.S.) 842, 76 Atl. 1063, holding that under Laws of 1906 wife may sue in her own name for tort committed against her.

### Loss of services as gist of action for criminal conversation.

Criticized in *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607, holding loss of services is not the gist of an action for criminal conversation brought by the husband.

### General and proximate damages.

Cited in *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, holding the damages in cases of unintentional negligence are limited to the natural and probable consequences of the acts done: *Jex v. Straus*, 122 N. Y. 293, 25 N. E. 478, holding the injury must proceed so directly from the wrongful act that according to common experience and the usual course of events, it might, under the particular circumstances, have reasonably been expected; *Swain v. Schieffelin*, 134 N. Y. 471, 18 L.R.A. 385, 31 N. E. 1025, holding damages recoverable for ice cream destroyed and for loss of customers caused by sale of poisonous cream through use of defendant's coloring material sold under a warranty: *Rockefeller v. Merritt*, 22 C. C. A. 608, 40 U. S. App. 666, 35 L.R.A. 633, 76 Fed. 909, holding the damages in cases of fraudulent contract of sale must be the natural and proximate consequences of the injury; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, 1 Eng. Rul. Cas. 717, holding it is not too remote if the injury is the natural and probable consequence of the alleged cause: *Whitney v. Moignard*, L. R. 24 Q. B. Div. 630, 59 L. J. Q. B. N. S. 324, holding one publishing a libel which he must know will be widely published is liable for all the consequences of its repetition.

Cited in note in 8 Eng. Rul. Cas. 415-417, on remoteness of damages.

### Effect of an intervening external cause on right to damage.

Cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84, holding a man may some times be liable in tort, notwithstanding the damage was attributable in part to the intervening misconduct of a third person: *McDonald v. Edwards*, 20 Misc. 523, 46 N. Y. Supp. 672, holding where the voluntary act of a third party intervened to cause servant's dismissal, the slanderous words were not a proximate cause; *The Young America*, 31 Fed. 749, holding the unlawful acts of third persons, are never to be attributed to the original wrong as a proximate cause of the damage for which a recovery can be had.

### Pleading facts in libel and slander.

Cited in *May v. Wood*, 172 Mass. 11, 51 N. E. 191, holding in an action founded on false and malicious statements inducing a master to discharge his servant, the pleading, the declaration, must set out substantially the false and malicious statements.

8 E. R. C. 395, *ROBERTS v. ROBERTS*, 5 Best & S. 384, 10 Jur. N. S. 1027, 33 L. J. Q. B. N. S. 249, 10 L. T. N. S. 602, 12 Week. Rep. 909.

### Loss of consortium as special damages.

Cited in *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 974, 140 S. W. 661,



Ann. Cas. 1913B, 1151, holding that alleged loss of society because of being charged with being a negro does not render words actionable slander; *Palmer v. Solmes*, 30 U. C. C. P. 481, holding loss of consortium vicinorum is not sufficient to support special damages; *Palmer v. Solmes*, 45 U. C. Q. B. 15, holding loss of society of friends and neighbors will not support special damages; *Davies v. Solomon*, L. R. 7 Q. B. 112, 41 L. J. Q. B. N. S. 10, 25 L. T. 799, 20 Week. Rep. 167, holding loss of cohabitation with husband and of hospitality of friends by reason of slandering a woman by statement that she had committed adultery, are such special damages as will support action.

Cited in note in 8 E. R. C. 399, 405, on loss of consortium as special damages.

#### **Slanderousness of words charging a woman with unchastity.**

Cited in *Cooper v. Seaverns*, 81 Kan. 267, 25 L.R.A. (N.S.) 517, 135 Am. St. Rep. 359, 105 Pac. 509, holding that spoken words imputing unchastity to woman are actionable without proof of special damage; *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289, holding where there is neither a statute punishing fornication, nor a statute making it slander per se to accuse a woman of the act, the words are not actionable per se.

Cited in note in 24 L.R.A. (N.S.) 602, 603, on slander and libel in charging woman with unchastity.

Distinguished in *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308, holding words charging a woman with fornication are not actionable per se where the charge is not an indictable offense.

8 E. R. C. 405, *VICTORIAN R. COMRS. v. COULTAS*, L. R. 13 App. Cas. 222, 52 J. P. 500, 57 L. J. P. C. N. S. 69, 58 L. T. N. S. 390, 37 Week. Rep. 129.

#### **Mental suffering as a basis of damages.**

Cited in *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S. W. 1005, on recovery for mental suffering unaccompanied by physical injury; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88; *Spohn v. Missouri P. R. Co.* 116 Mo 617, 22 S. W. 690,—holding there can be no recovery for mental anguish alone, unattended by any physical injury; *Peay v. Western U. Teleg. Co.* 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965; *Western U. Teleg. Co. v. Ferguson*, 26 Ind. App. 213, 59 N. E. 416; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434; *Butner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087; *Kester v. Western U. Teleg. Co.* 55 Fed. 603; *Western U. Teleg. Co. v. Wood*, 6 C. C. A. 432, 13 U. S. App. 317, 21 L.R.A. 706, 57 Fed. 471,—holding damages resulting from simple negligence in the prompt delivery of a telegraphic message are too remote and uncertain to be recoverable; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295, holding damages for mental suffering are not recoverable in either an independent action or as additional damages when a pecuniary loss has been shown; *Rowan v. Western U. Teleg. Co.* 149 Fed. 550, holding mental anguish, unaccompanied with bodily injury is too intangible and too remote to form the basis for the recovery of damages; *Western U. Teleg. Co. v. Chouteau*, 28 Okla. 664, 49 L.R.A. (N.S.) 664, 115 Pac. 879, Ann. Cas. 1912D, 824, holding that, in absence of statute, damages are not recoverable for mental distress alone, caused by negligent delay in delivering telegram; *Henderson v. Canada Atlantic R. Co.* 25 Ont. App. Rep. 437, holding damages for "mental shock" are not recoverable; *Ham v. Canadian Northern R. Co.* 1 D. L. R. 377, holding that jury should not be directed to assess

separate damages resulting exclusively from mental shock and those resulting from physical injury; *Taylor v. British Columbia Electric R. Co.* 16 B. C. 109, holding that jury should not be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independently of nervous shock; *Lordly v. Halifax*, 24 N. S. 1, on right to recover damages because of development of cataract on eye from shock caused by falling over hydrant in street.

Cited in 3 *Hutchinson*, Car. 3d ed. 1682, on carrier's liability for mental suffering of beneficiaries in action for death; 1 *White Pers. Inj. Railr.* 211, on mental anguish alone as basis for damages.

Distinguished in *Toronto R. Co. v. Toms*, 44 Can. S. C. 268 (affirming 22 Ont. L. Rep. 204), holding that damages from injury to nervous system by being thrown forwards on back of seat of car might be recovered as well as damages for injury to physical system; *Kirkpatrick v. Canadian Pacific R. Co.* 35 N. B. 598, holding damages should be allowed where both the mental and physical condition immediately followed the breaking down of bridge.

Disapproved in *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901, holding a recovery may be had for the mental suffering caused by failure to deliver telegraphic message.

#### —Fright as damage.

Cited in *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354 (reversing 4 Misc. 575, 25 N. Y. Supp. 744, 30 Abb. N. C. 362), holding where there is no immediate personal injury, there can be no recovery, injuries resulting from fright; *Braun v. Craven*, 175 Ill. 401, 42 N. E. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15, holding no liability exists by reason of mere fright occasioned by negligent acts; *Miller v. Baltimore & O. S. W. R. Co.* 78 Ohio St. 309, 18 L.R.A.(N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499, holding there can be no recovery for fright, unaccompanied by contemporaneous physical injury; *Mack v. South Bound R. Co.* 52 S. C. 323, 40 L.R.A. 679, 68 Am. St. Rep. 913, 29 S. E. 905, holding it unreasonable to hold persons, who are merely negligent, bound to anticipate and guard against fright and the consequences of fright; *Ford v. Schliessman*, 107 Wis. 479, 83 N. W. 761, holding damages arising from mere sudden terror, unaccompanied by any physical injury, but occasioning a nervous or mental shock, can not be considered a consequence, in the ordinary course of things, as flowing from mere negligence; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335, holding there can be no recovery for mere fright though physical suffering and injury later result; *Ward v. West Jersey & S. R. Co.* 65 N. J. L. 383, 47 Atl. 561, holding there can be no recovery though subsequent physical ills result from the fright; *Atkinson v. Grand Trunk R. Co.* 17 Ont. Rep. 220, holding there can be no recovery for injuries sustained from being thrown from cutter where the driver, becoming frightened at approach of car, pulled the horse up so suddenly as to cause the fall; *Craven v. Braun*, 73 Ill. App. 189, on fright as the reasonable and natural consequences of injury to health; *Lesch v. Great Northern R. Co.* 97 Minn. 503, 7 L.R.A.(N.S.) 93, 106 N. W. 955 (dissenting opinion), on recovery of damages occasioned by fright; *Kansas City, Ft. S. & M. R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645, holding there can be no recovery for fright as an inde-

pendent element of damage, where caused by negligence of carrier in taking a passenger beyond her destination; *Crutcher v. Big Four*, 132 Mo. App. 311, 111 S. W. 891, holding there can be no recovery for injury to health, caused by conductor informing a lady passenger that she was on the wrong train and her ticket could not be accepted.

Cited in notes in 14 L.R.A. 667, on fright as basis for a cause of action; 3 L.R.A.(N.S.) 55, on right to recover for physical injury resulting from fright caused by wrongful act.

Cited in 4 Elliott, Railr. 2d ed. 963, on right to recover for mere fright.

Distinguished in *Watkins v. Kaolin Mfg. Co.* 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, holding damages are recoverable for physical injuries to a woman, resulting from nervous shock, caused by negligent acts in exposing her and her family to danger by blasting; *Pugh v. London, B. & S. C. R. Co.* [1896] 2 Q. B. 248, 65 L. J. Q. B. N. S. 521, 74 L. T. N. S. 724, 44 Week. Rep. 627, holding a recovery may be had on an insurance policy though the injury complained of results from the nervous shock arising from fright.

Disapproved in *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, holding where a physical injury results from fright or other mental shock, caused by the wrongful act or omission of another, damages are recoverable; *Wilkinson v. Downton* [1897] 2 Q. B. 57, 66 L. J. Q. B. N. S. 493, 76 L. T. N. S. 493, 45 Week. Rep. 525, holding illness through mental shock, where caused by a practical joker informing a married woman that her husband had been seriously injured, is not too remote or unnatural a consequence to be actionable.

#### —Fright without physical impact.

Cited in *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742, holding that cause of action does not lie in favor of woman for pain and suffering resulting solely from fright, superinduced by assault and battery committed upon her husband in her presence; *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 688, holding that damages may be recovered for actual physical injuries resulting from fright, caused by blasting, although there is no direct physical impact; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 69 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566, holding that no recovery can be had for fright, even if it results in physical injury, where there are no physical injuries except those caused by fright; *Pankopf v. Hinkley*, 141 Wis. 146, 24 L.R.A.(N.S.) 1159, 123 N. W. 625, holding that miscarriage following fright caused by negligence, will entitle one who suffers it to maintain action, although there was no physical contact with the person; *Geiger v. Grand Trunk R. Co.* 10 Ont. L. Rep. 11, holding though vehicle was struck by car and slight bruises were suffered there can be no recovery for the mental or nervous shock complained of.

Cited in 1 Nellis, St. Rys. 2d ed. 487, on right of recovery for fright or mental distress occasioned by negligence in absence of physical injury.

Distinguished in *Grand Trunk R. Co. v. Sibbald*, 20 Can. S. C. 259, holding where defective condition of crossing contributed to the injury after horses became frightened at train lawfully running on the tracks, a recovery may be had though there was no impact with cars.

Disapproved in *Simone v. Rhode Island Co.* 28 R. I. 186, 9 L.R.A.(N.S.) 740, 66 Atl. 202, holding a recovery may be had for all the physical ills that result as the natural results of fright due to the negligence of common carrier; *Dulieu v. White* [1901] 2 K. B. 669, 70 L. J. K. B. N. S. 837, 85 L. T. N. S. 126, 50 Week.



Rep. 76, 17 Times L. R. 555, holding damages resulting from a nervous shock which brings about a miscarriage are recoverable though no actual impact results.

#### **Proximate cause.**

Cited in *Purcell v. Lauer*, 14 App. Div. 33, 43 N. Y. Supp. 988 (dissenting opinion), on proximate cause of damages; *Haile v. Texas & P. R. Co.* 9 C. C. A. 134, 23 U. S. App. 80, 23 L.R.A. 774, 60 Fed. 557, holding damages sustained by a wrongful act must be the natural result of the act—such a consequence as, in the ordinary course of things would flow from it; *New Brunswick R. Co. v. Vanwart*, 17 Can. S. C. 35, holding where team at a railroad siding, where lumber was delivered from mill, became frightened and ran upon tracks where driver was killed, it cannot be said the accident was chargeable to the railroad company.

Cited in notes in 8 Eng. Rul. Cas. 418, on remoteness of damages; 18 E. R. C. 736, on proximate and remote cause of damages; 6 Eng. Rul. Cas. 623, and 22 E. R. C. 313, on proximate and remote damages.

Distinguished in *Tuttle v. Atlantic City R. Co.* 66 N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Atl. 450, holding where negligence of railroad company caused a woman to become frightened and injured in attempting to escape injury a recovery may be had.

#### **Distinction between mental and physical suffering.**

Cited in *Warren v. Boston & M. R. Co.* 163 Mass. 484, 40 N. E. 895, holding it a physical injury to the person to be thrown out of a wagon, or compelled to jump out, even though the harm done consists mainly of nervous shock.

8 E. R. C. 419, *FRANKLIN v. SOUTHEASTERN R. CO.* 3 Hurlst. & N. 211, 4 Jur. N. S. 565, 6 Week. Rep. 573.

#### **Compensatory basis of damages for death by wrongful act.**

Cited in *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491 (dissenting opinion), on measure of damages for wrongful death; *Sherman v. Western Stage Co.* 24 Iowa, 515, holding exemplary damages are not awarded in actions brought for the death; *Paulmier v. Erie R. Co.* 34 N. J. L. 151; *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 44 Atl. 633,—holding the jury cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary injury only; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303, holding the loss must be confined to the pecuniary loss suffered by the kindred; *Orgall v. Chicago, B. & Q. R. Co.* 46 Neb. 4, 64 N. W. 450, holding the petition must show a pecuniary loss has resulted to state a cause of action; *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302, holding there can be no recovery for loss of services without evidence to that effect; *Green v. Hudson River R. Co.* 32 Barb. 25, holding that in action for death from wrongful act, damages resulting from loss of society of wife are to be excluded from consideration of jury; *Boyden v. Fitchburg R. Co.* 70 Vt. 125, 39 Atl. 771, holding that in action under statute for wrongful death, it is sufficient if plaintiff shows that he had reasonable expectation of pecuniary advantage from continued life of deceased; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, holding the pain and suffering of the deceased, and loss of the comfort of society of the deceased are not considered elements of damage under statutes giving an action for causing death; *Lett v. St. Lawrence & O. R. Co.* 1 Ont. Rep. 545 (dissenting opinion), on recovery in action under Campbell Act as limited to compensation for pecuniary loss; *London & W. Trusts Co. v. Grand Trunk R. Co.* 22 Ont. L. Rep. 262, holding that in action for wrongful death, amount of damages to be allowed



may be determined by reference to future as well as present conditions; *Davidson v. Stuart*, 14 Manitoba L. Rep. 74, holding the happening of the injuries to the deceased and the death do not of themselves give the right of action; *Dalton v. Southeastern R. Co.* 27 L. J. C. P. N. S. 227, 4 C. B. N. S. 296, 4 Jur. N. S. 711, 6 Week. Rep. 574, holding legal liability alone is not the test of injury in respect of which damages may be recovered under the Campbell act.

Cited in note in 17 L.R.A. 74, 80, on measure of recovery for death caused by negligence.

Cited in 1 Cooley, Torts, 3d ed. 570, 575, 578, on measure of damages for death by wrongful act; 4 Dillon, Mun. Corp. 5th ed. 3005, on measure of damages for injury on defective street; 3 Elliott, Railr. 2d ed. 890, on cause of action for death of employee being merged in recovery for injuries in action brought during employee's lifetime; 1 Thomas, Neg. 2d ed. 875, on measure of damages for causing death; 1 Thomas, Neg. 2d ed. 885, on measure of damages for causing death of parent, husband or wife.

Distinguished in *Bradburn v. Great Western R. Co.* 8 E. R. C. 439, L. R. 10 Exch. 1, 44 L. J. Exch. N. S. 9, 31 L. T. N. S. 464, 23 Week. Rep. 48, holding defendant could not claim the mitigation of damages in the amount of accident insurance realized by plaintiff.

Disapproved in *Ladd v. Foster*, 31 Fed. 827, holding insurance recovered on the life of the deceased, cannot be set off against the amount recovered by the administrator by reason of wrongful death.

#### — Loss of expected service.

Cited in *Wolfe v. Great Northern R. Co.* (1890) Ir. L. R. 26 C. L. 548; *Baltimore & O. R. Co. v. State*, 60 Md. 449; *McDonald v. King*, 7 Can. Exch. 216; *Groff v. Cincinnati & I. R. Co.* 1 Cin. Sup. Ct. Rep. 264; *Lazelle v. Newfane*, 70 Vt. 440, 41 Atl. 511,—holding pecuniary loss to those having a reasonable expectation of pecuniary benefit is the basis of measure of damages; *Blackley v. Toronto R. Co.* 27 Ont. App. Rep. 44; *Pennsylvania R. Co. v. Adams*, 55 Pa. 499,—holding a reasonable expectation of pecuniary advantage is the basis taken in measuring the loss resulting; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793, holding the damages given are for the pecuniary loss occasioned; *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472, holding the pecuniary loss must be to those who have a reasonable expectation of pecuniary benefit; *Jordan v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 40, 11 S. W. 1013, holding there must be a legal expectation of pecuniary benefit from the continuance of the life as basis for damages; *Baltimore & O. R. Co. v. State*, 63 Md. 135, holding the claim must be founded on pecuniary loss, actual or expected; *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267, holding the jury should calculate the damages in reference to a reasonable expectation of benefit from the continuance of the life; *Renwick v. Galt, P. & H. Street R. Co.* 11 Ont. L. Rep. 158, holding it is not necessary to prove a present actual pecuniary loss, but merely a reasonable expectation of pecuniary benefit; *Pym v. Great Northern R. Co.* 32 L. J. Q. B. N. S. 377, 4 Best & S. 396, 10 Jur. N. S. 199, 8 L. T. N. S. 734, 11 Week. Rep. 922, holding the jury bound to give damages for the deprivation of advantages of a pecuniary nature, reasonably probable from a continuance of life.

#### — Loss of voluntary service or support.

Cited in *Boyden v. Fitchburg R. Co.* 70 Vt. 125, 39 Atl. 771, holding it

is not necessary that the next of kin should have a legal claim upon the deceased for services or support.

**—Nominal damages.**

Cited in *Baltimore & O. R. Co. v. State*, 24 Md. 271, holding fact that deceased was out of employment or failure to prove amount derived from employment would not limit recovery to nominal damages only.

**—Burden of proving damage.**

Cited in *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44, holding nominal damages cannot be recovered, unless supported by evidence; *Lett v. St. Lawrence & O. R. Co.* 11 Ont. App. Rep. 1 (reversing 1 Ont. Rep. 545), holding, under the provisions of the Lord Campbell act that the husband and children of a woman killed are entitled to damages without showing a pecuniary loss.

**Evidence on compensatory damages.**

Cited in *Beard v. Skeldon*, 13 Ill. App. 54, holding evidence of pecuniary condition of parties to be compensated is wholly irrelevant; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, holding neither the defendant's wealth nor the pecuniary condition of the ones to be compensated are to be considered.

**Parent's right of recovery for death of child.**

Cited in *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715, holding that sufficient prima facie proof that father had reasonable expectancy of benefit from continuance of son's life, where father was 71 years old and son managed father's farm without wages; *Bond v. United R. Co.* 159 Cal. 270, 48 L.R.A.(N.S.) 687, 113 Pac. 366, Ann. Cas. 1912C, 50, holding that in action by mother for negligent injuries causing death of son, who was wage earner supporting her, her recovery is not limited to his earning capacity during minority; *Carpenter v. Buffalo, N. Y. & P. R. Co.* 38 Hun, 116, holding fact that son lived at home with the father, and worked on the farm with him would lead to a reasonable expectation of future benefits such as will support action; *Potter v. Chicago & N. W. R. Co.* 21 Wis. 373, 94 Am. Dec. 548, holding the estate and condition of the parents might have much to do with the question of damages for loss of life of child; *Runciman v. Star Line S. B. Co.* 35 N. B. 123; *New Brunswick R. Co. v. Vanwart*, 17 Can. S. C. 35,—holding the father has reasonable expectations of future pecuniary benefits from the life of his son and may recover damages for his death; *McKeown v. Toronto R. Co.* 19 Ont. L. Rep. 361, upholding a verdict in favor of a parent of a child of four years; *Fordyce v. McCants*, 51 Ark. 509, 4 L.R.A. 296, 14 Am. St. Rep. 69, 11 S. W. 694, holding in absence of proof that son who was of legal age contributed money to the father the recovery must be confined to nominal damages; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161, 49 N. W. 694, holding the question of damages in cases of wrongful death of a child of few years must be committed largely to the sound practical sense and fair judgment of the jury; *Clark v. London General Omnibus Co.* [1906] 2 K. B. 648, 2 B. R. C. 694, 75 L. J. K. B. N. S. 907, 95 L. T. N. S. 435, 22 Times L. R. 691, holding that father cannot recover funeral expenses of infant daughter whose death was caused by negligence; *McKeown v. Toronto R. Co.* C. R. [1909] A. C. 416, holding that in action for death of child, it is sufficient to show reasonable expectation of pecuniary benefit capable of being estimated; *Mason v. Bertram*, 18 Ont. Rep. 1; *Ricketts v. Markdale*,

31 Ont. Rep. 610, -holding that in action by parent for death of child, it is sufficient if there is evidence to justify conclusion that there is reasonable expectation of pecuniary benefit in future; *Brown v. British Columbia Electric R. Co.* 15 B. C. 350, holding that evidence that deceased had sent money to parents who had advanced money for his passage is insufficient to show reasonable expectation of benefit from deceased.

Cited in 1 White, Pers. Inj. Railr. 71, on father's right of action for death of child.

Distinguished in *Agricultural & M. Asso. v. State*, 71 Md. 86, 17 Am. St. Rep. 597, 18 Atl. 37, holding conjecture that minor son would contribute to the father's support can form no reasonable foundation for damages; *Hollyday v. Reeves*, 5 Hughes, 89, Fed. Cas. No. 6,625, holding where deceased was a young man of eighteen and was more than living up his salary there cannot be held to be any considerable pecuniary damages; *Sykes v. North Eastern R. Co.* 44 L. J. C. P. N. S. 191, 32 L. T. N. S. 199, 23 Week. Rep. 473, holding mere fact that father derived an advantage from a contract with his son is not such a benefit as the statute contemplates.

#### **Meaning of word "child" as used in statutes governing loss by death.**

Cited in *Putman v. Southern P. Co.* 21 Or. 230, 27 Pac. 1033, holding the word "child," as used in statutes giving a cause of action for wrongful death means an adult as well as minor son or daughter.

#### **— Construction of word "pecuniary."**

Cited in *St. Lawrence & O. R. Co. v. Lett*, 11 Can. S. C. 422, holding the word pecuniary includes the loss of maintenance or of the intellectual, moral and physical training which a mother only can give to her children.

#### **— Of words "party injured."**

Cited in *Osborn v. Gillett*, L. R. 8 Exch. Ch. 88, 42 L. J. Exch. N. S. 53, 25 L. T. N. S. 197, 21 Week. Rep. 409 (dissenting opinion), on construction of words "party injured."

#### **Validity of statutes giving a cause of action for wrongful death.**

Cited in *Bedore v. Newton*, 54 N. H. 117, holding no natural or constitutional right of the subject with respect to private property is invaded by statutes giving an action in damages for a wrongful death.

#### **Duty of court to correct verdict.**

Cited in *Medinger v. Brooklyn Heights R. Co.* 6 App. Div. 42, 39 N. Y. Supp. 613, holding courts should scrutinize with care verdicts awarding damages and should correct without hesitancy where they do not rest upon substantial testimony.

8 E. R. C. 429. *YATES v. WHYTE*, 1 Arnold, 85, 4 Bing. N. C. 272, 2 Jur. 303  
7 L. J. C. P. N. S. 116, 5 Scott, 640.

#### **Right of set-off of insurance received against damages.**

Cited in *Stone v. New York*, 25 Wend. 157; *Althof v. Wolf*, 2 Hilt. 344; *Robinson v. New Brunswick R. Co.* 23 N. B. 323; *Brown v. McRoe*, 17 Ont. Rep. 712; *Gaggin v. Upton*, Dru. 427; *The Avon*, 1 Brown, Adm. 170, Fed. Cas. No. 680.—holding the amount paid by the insurance company cannot be deducted from the amount of damages assessed; *The Monticello v. Mollison*, 17 How. 152, 15 L. ed. 68, holding that fact that owner of vessel injured in collision had received satisfaction from insurers furnished no ground of defense for owner of vessel at fault; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep.

384, holding money received on a policy of insurance by the family of the deceased cannot be taken into account in assessing the damages; *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304, holding that town liable for damages occasioned by defective highway is not entitled to have deducted amount received by plaintiff from insurance company on account of injuries; *The Atlas (Phoenix Ins. Co. v. The Atlas)* 93 U. S. 302, 23 L. ed. 863, holding the wrong-doer cannot claim the benefit of the insurance, nor claim a reduction of damages to that extent; *Weber v. Morris & E. R. Co.* 36 N. J. L. 213, holding in case party whose house was destroyed deducts amount of insurance on building in his claim and recovers a judgment, such judgment is conclusive as to his damages.

Cited in note in 8 E. R. C. 441-444, on reduction of damages by amount paid by insurers.

Disapproved in *Archambault v. Lamere*, 2 Dorion (Quebec) 97, holding creditor who has insured debtor's property, and received insurance, must deduct amount of insurance from debt.

#### **—Action over by insurer.**

Cited in *Cushman & R. Co. v. Boston & M. R. Co.* 82 Vt. 390, 73 Atl. 1073, 18 Ann. Cas. 708, holding that where owner of building destroyed by fire from locomotive executed release to railroad company, release is no bar to suit against railroad to recover amount of insurance; *Simpson v. Thomson*, L. R. 3 App. Cas. 279, 38 L. T. N. S. 1, 3 Asp. Mar. L. Cas. 567, holding where insurance is on two vessels of same owner which collide and one is lost, the insurers upon payment of the entire loss have no action for damages against the owner as no right of action for damages lies in any one's favor; *Midland Ins. Co. v. Smith*, L. R. 6 Q. B. Div. 561, 50 L. J. Q. B. N. S. 329, 45 L. T. N. S. 411, 29 Week. Rep. 850, 45 J. P. 699, holding no action lies against an insured and his wife for damages caused by the felonious burning of the property insured by the wife, where the burning was without the privity of the insured.

#### **Independence of causes action for tort and for insurance.**

Cited in *Bird v. Nomack*, 69 Ala. 390; *Lake Erie & W. R. Co. v. Hobbs*, 40 Ind. App. 511, 81 N. E. 90; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Weber v. Morris & E. R. Co.* 35 N. J. L. 409, 10 Am. Rep. 253,—holding payment by the insurer before suit is brought cannot affect the right of action for damages; *Anderson v. Miller*, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615, holding the question of who shall be entitled to the proceeds of the recovery, the insurer or insured, constitutes no defense to an action for the damages; *New England Mut. M. Ins. Co. v. Dunham*, 3 Cliff. 332, Fed. Cas. No. 10,155 (affirming 1 Low. Dec. 253, Fed. Cas. No. 4152), holding that where vessel insured, suffered loss by collision and recovers from owner of colliding vessel upon ground that such vessel was at fault, amount recovered is no bar to further recovery from underwriters for balance of loss; *Dickenson v. Jardine*, L. R. 3 C. P. 639, 37 L. J. C. P. N. S. 321, 18 L. T. N. S. 717, 16 Week. Rep. 1169, 14 Eng. Rul. Cas. 431, holding where the assured proceeds in the first instance against the underwriters, they cannot avail themselves of plea that the assured has a distinct right against other parties.

Cited in note in 23 L.R.A.(N.S.) 870, as to whether destroyer of insured property may defeat owner's suit upon ground that right of action is in insurer.



**Subrogation on payment of total loss by the insurer.**

Cited in *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, holding that insurer's right to recover against wrongdoer causing loss is based upon equitable right of subrogation; *Regan v. New York & N. E. R. Co.* 60 Conn. 124, 25 Am. St. Rep. 306, 22 Atl. 503, holding if application is first made to the insurer and whole loss received, the claim for damages against the wrong-doer is held in trust for the insurer; *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duv. 4, holding the carrier must pay the damages before he can claim the benefit of the contract with a consignee by which he is entitled to claim insurance on property destroyed; *Kellar v. Merchants Ins. Co.* 7 La. Ann. 29, on right to subrogation upon payment; *Merriek v. Brainard*, 38 Barb. 574, holding the insurer entitled to receive so much of the damages as is received over and above the actual loss; *Kernochan v. New York Bowery Fire Ins. Co.* 5 Duer, 1, holding where total loss is paid, the underwriter succeeds to all the collateral remedies to which the assured might have resorted; *The Potomac (The Potomac v. Cannon)* 105 U. S. 630, 26 L. ed. 1194, holding the insurer by payment acquires a corresponding right in any damages to be recovered by the insured against the wrong-doer; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566, holding the payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the carrier for the recovery of its value; *The St. Johns*, 101 Fed. 469, holding insurers are subrogated, on payment, to the rights of the insured to any other remedies for the same loss; *Burton v. Gore Dist. Mut. F. Ins. Co.* 12 Grant, Ch. (U. C.) 156, holding the insurer on payment of loss of buildings entitled to assignment of mortgage security where mortgage was given contrary to terms of policy; *Stringer v. English & S. M. Ins. Co.* L. R. 4 Q. B. 676, 38 L. J. Q. B. N. S. 321, holding by coming upon the underwriters for an indemnity for a total loss they thereby entitled the insurers to be subrogated to any benefits remaining.

**— Action in name of insured.**

Cited in *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *First Presby. Soc. v. Goodrich Transp. Co.* 10 Biss. 312, 7 Fed. 257,—holding the insurer must bring his action in the name of the insured; *Hall v. Nashville & C. R. Co.* 13 Wall. 367, 20 L. ed. 594, holding the insurer may maintain a suit after payment of loss if it is brought in the name of the insured.

**Effect of abandonment of ship to underwriters.**

Cited in *Mason v. Marine Ins. Co.* 54 L.R.A. 700, 49 C. C. A. 106, 110 Fed. 452, holding the effect of abandonment of sunken ship to insurers is to pass title and every right to indemnity to them; *Clark v. Wilson*, 103 Mass. 219, 4 Am. Rep. 532, holding a valid abandonment for a total loss has a like effect to payment of the loss and vests in the underwriters the interest of the insured to any right to be compensated.

Cited in note in 1 Eng. Rul. Cas. 154, on effect of abandonment in transferring rights under marine policy.

**Reduction of damages by sums realized collaterally on account of loss.**

Cited in *Jebsen v. East & West India Dock Co.* L. R. 10 C. P. 300, 44 L. J. C. P. N. S. 181, 32 L. T. N. S. 321, 23 Week. Rep. 624, 2 Asp. Mar. L. Cas. 505, holding fact that profits were made by some of the joint contractors through breach of contract to discharge a ship of its cargo is no ground for reduction of damages collectible to that extent.

Distinguished in *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624,

holding in an action for personal injuries it is proper to show injured party was paid wages, whereby his loss was reduced.

8 E. R. C. 439, *BRADBURN v. GREAT WESTERN R. Co.* 44 L. J. Exch. N. S. 9, L. R. 10 Exch. 1, 31 L. T. N. S. 464, 23 Week. Rep. 48.

**Insurance or indemnity as matter in reduction of damages.**

Cited in *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753, holding that evidence as to insurance realized by the plaintiff for the injury was inadmissible; *Robinson v. New Brunswick R. Co.* 23 N. B. 323, holding money paid on fire insurance policy cannot be set up in defense to damages for wrongful burning; *Longhead v. Collingwood Shipbuilding Co.* 16 Ont. L. Rep. 64, on right of jury to consider insurance in mitigation of damages.

Cited in notes in 67 L.R.A. 88, on mitigation of damages for personal injury by receipt of insurance money; 5 E. R. C. 525, on measure of damages for carrier's breach of contract; 80 E. R. C. 444, on reduction of damages by amount paid by insurers.

Cited in *Benjamin Sales* 5th ed. 96, on reduction of damages for negligence by collateral compensation; 3 *Hutchinson Car.* 3d ed. 1717, on right to consider future damages in determining extent of carrier's liability for injuries; 6 *Thompson Neg.* 205, on mitigation of damages for wrongful death; 6 *Thompson Neg.* 282, on reduction of damages for personal injury by insurance.

Distinguished in *Lee v. Western Union Teleg. Co.* 51 Mo. App. 375, holding an employee who was caused to make a useless journey could not recover for time lost thereby for which the employer paid him; *Ephland v. Missouri P. R. Co.* 57 Mo. App. 147, holding same of time lost by reason of personal injury but paid for by employer; *Warboys v. Lachine Rapids Hydraulic & Land Co.* Rap. Jud. Quebec 22 C. S. 531, holding that under statute where plaintiff is heir to deceased money accruing to one as such heir, must be deducted from "damages occasioned by the death" caused by tort.

Disapproved in *Archambault v. Lamere*, 2 *Dorion (Quebec)* 97, holding creditor cannot, after being paid his insurance on debtor's property, recover full amount of debt from debtor.

**—Where action is for wrongful killing of insured.**

Cited in *Baltimore & O. R. Co. v. Wightman*, 29 *Gratt.* 431, 26 *Am. Rep.* 384, holding that money received for life insurance cannot be taken into account in fixing damages for wrongfully causing death; *Ladd v. Foster*, 31 *Fed.* 827; *Beckett v. Grand Trunk R. Co.* 13 *Ont. App. Rep.* 174,—on the right to deduct life insurance under Lord Campbell's Act; *San Antonio & A. P. R. Co. v. Long*, 87 *Tex.* 148, 24 *L.R.A.* 637, 47 *Am. St. Rep.* 87, 27 *S. W.* 113, holding that under statute, recovery for death of another cannot be had by one who receives from estate of deceased property greater in value, than all prospective benefits that would have accrued if death had not occurred; *Lett v. St. Lawrence & O. R. Co.* 11 *Ont. App. Rep.* 1, on distinction between cases where person injured sues and those where others sue under Lord Campbell's Act; *Dawson v. Niagara, St. C. & T. R. Co.* 23 *Ont. L. Rep.* 670, holding that under Fatal Accidents Act, jury should be told that it is their duty to take into account certain items of insurance money, but not that they must deduct whole amount.

**Subrogation under policy of insurance.**

Cited in *Aetna L. Ins. Co. v. Parker*, 96 *Tex.* 287, 72 *S. W.* 168, holding that

the insurer was not entitled to be subrogated to an action against person causing loss.

#### **Nature of accident or life insurance.**

Cited in *Hurd v. Doty*, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371, on life insurance being a contract for money to be paid rather than one of indemnity.

#### **Recoupment of collateral benefits against damages.**

Cited with special approval in *Jebson v. East & West India Dock Co.* L. R. 10 C. P. 300, 44 L. J. C. P. N. S. 181, 32 L. T. N. S. 32, 23 Week. Rep. 624, 2 Asp. Mar. L. Cas. 505, holding damages against joint parties could not be reduced by the amount of benefits derived by individual parties from contracts collateral to the injury.

Cited in *The Marpessa* [1891] P. 403, 61 L. J. Prob. N. S. 9, 66 L. T. N. S. 356, 40 Week. Rep. 239, 7 Asp. Mar. L. Cas. 155, holding that loss or benefit sustained by ship in making general average could not be reckoned in damages against parties wrongfully injuring ship.

8 E. R. C. 445, *KNIGHT v. EGERTON*, 7 Exch. 407.

#### **Measure of damages for injury to property.**

Cited in *Lloyd v. Dartmouth*, 30 N. S. 208, holding that the damages caused by an overflow are computed on the condition of the land after, as compared with condition of land before overflow.

#### **—On unlawful distress of sale thereafter.**

Cited in *Howell v. Listowell Rink & Park Co.* 13 Ont. Rep. 476, holding that where there was a failure to appraise followed by a good tender and sale thereafter full damages might be recovered; *Pegg v. Supreme Ct.* I. O. F. 1 Ont. L. Rep. 97, holding that on sale on distress without appraisement the measure of damages is the real value of what was sold minus the rent due; *Shultz v. Reddick*, 43 U. C. Q. B. 155, holding that in distress sale for rent under statute without the 5 day written notice damage is real value of goods less the rent in arrear; *Link v. Bush*, 13 Ont. Pr. Rep. 425, on measure of damages for distress not prosecuted according to law; *Dewar v. Clements*, 20 Manitoba L. Rep. 212, holding that tenant will be entitled to recover real value of goods less rent and expenses where distress for nonpayment of rent is illegal.

#### **Instructions on measure of damages.**

Cited in *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052, holding it error not to instruct jury as to measure of damages and allowing them to speculate thereon; *Western Maryland R. Co. v. Martin*, 110 Md. 554, 73 Atl. 267, holding that court must decide and instruct jury in respect to what elements and within what limits damages may be estimated in particular action; *Wilburn v. St. Louis, I. M. & S. R. Co.* 36 Mo. App. 203, holding measure or rule of damages always question of law and never to be submitted to jury as question of fact; *Barnes & Co. v. Sharpe*, 11 C. L. R. (Austr.) 462, holding that failure to object to direction at trial, constitutes waiver in so far as amount of damages in action for defamation.

Distinguished in *Barthelotte v. Melanson*, 35 N. B. 652, where in an action on a bond the jury was told that the measure of damages was the penal sum named in the bond and verdict was according thereto.

#### **Duty of court to instruct jury.**

Cited in *Citizens' Street R. Co. v. Burke*, 98 Tenn. 650, 40 S. W. 1085, holding it error when no charge whatever is given upon a measure of damages in a

personal injury case though none was requested; *Peshine v. Shepperson*, 17 Gratt. 472, 94 Am. Dec. 468, holding that where an instruction is asked, part of which should and part should not be given, it is error to refuse to give the part that should be given; *Domville v. Keavan*, 13 N. B. 392, holding unless jury is properly directed to disregard it, testimony of party of his conclusion and not as to facts of damages is ground for new trial.

8 E. R. C. 447, *PHILLIPS v. LONDON & S. W. R. CO.* 41 L. T. N. S. 121, L. R. 5 Q. B. Div. 78, 28 Week. Rep. 10, 44 J. P. 217, affirming the decision of the Queen's Bench Division, reported in L. R. 4 Q. B. Div. 406, 40 L. T. N. S. 813.

#### **Right of court to set aside verdict for damages.**

Cited in *Berry v. Lake Erie & W. R. Co.* 72 Fed. 488, holding that verdict of \$1100.00 in favor of seven year old girl for loss of right leg below knee, would not be set aside because of inadequacy; *American Tin-Plate Co. v. Williams*, 31 Ind. App. 46, 65 N. E. 304; *Wilson v. Jernigan*, 59 Fla. 277, 49 So. 44; *Paul v. Leyenberger*, 17 Ill. App. 167,—holding that appellate court may set aside verdict for insufficient as well as for excessive damages; *Tathwell v. Cedar Rapids*, 122 Iowa, 50, 97 N. W. 96, holding that where trial judge finds that jury failed to allow amount of damages shown by uncontradicted testimony, he may grant new trial; *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, holding that court at common law had power to set aside verdict for insufficient as well as for excessive damages; *Burdiet v. Missouri P. R. Co.* 123 Mo. 221, 26 L.R.A. 384, 45 Am. St. Rep. 528, 27 S. W. 453 (dissenting opinion), on power of court on appeal to grant new trial because of inadequacy of damages in negligence cases; *Toledo R. & Light Co. v. Mason*, 81 Ohio St. 463, 28 L.R.A.(N.S.) 130, 91 N. E. 292; *Simonsen v. Brooklyn Heights R. Co.* 53 App. Div. 478, 65 N. Y. Supp. 1077, 8 Am. Neg. Rep. 306,—holding that in actions for personal injury, if verdict is unreasonably small appellate court may grant new trial; *Vanhorn v. Verral*, 4 D. L. R. 624, holding that in personal injury action appellate court may, if action was tried without jury increase amount of damages without remitting case for new trial; *Union Bank v. McHugh*, 44 Can. S. C. 473 (dissenting opinion), on right to set aside verdict where based upon improper measure of damages; *Church v. Ottawa*, 25 Ont. Rep. 298, holding that appellate court may grant new trial on ground that damages allowed in personal injury action, were inadequate; *Fraser v. London Street R. Co.* 29 Ont. Rep. 411, upholding verdict for plaintiff in negligence action except as to amount of damages and directing new trial, unless plaintiff would accept less sum; *Ellis v. Abell*, 10 Ont. App. Rep. 226, holding that new trial should be granted where evidence did not support claim for breach of contract made in pleadings and verdict was based upon breach of warranty incident to contract; *Johnston v. Great Western R. Co.* [1904] 2 K. B. 250, 73 L. J. K. B. N. S. 568, 50 Week. Rep. 612, 91 L. T. N. S. 157, 21 Times L. R. 455, holding verdict of jury for damages may be set aside when same is excessive and probable cause was a disregard of court's direction as to measure of damages, though it could not be said that in no event could the award be reasonably found; *Watt v. Watt* [1905] A. C. 115, 74 L. J. K. B. N. S. 438, 69 J. P. 249, 53 Week. Rep. 547, 92 L. T. N. S. 480, 21 Times L. R. 386, holding court has no power to reduce verdict on condition of not ordering new trial unless parties consent.

Cited in notes in 47 L.R.A. 45, 47, on inadequacy of damages as ground for



setting aside verdict; 8 E. R. C. 457, on excessive damages as ground for new trial.

The decision of the Queen's Bench Division was cited in *Louisville & N. R. Co. v. Street*, 164 Ala. 155, 51 So. 306, 20 Ann. Cas. 877, holding that under section 2486 of Code verdict of jury is not reviewable by trial court for inadequacy; *Leavitt v. Dow*, 105 Me. 50, 134 Am. St. Rep. 534, 72 Atl. 735, 17 Ann. Cas. 1072, holding that appellate court may set aside verdict for insufficient as well as for excessive damages; *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242, holding that inadequacy of damages may be ground of setting aside verdict and ordering new trial.

### **Measure and elements of damages for personal injuries.**

Cited in *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574, holding that in action for personal injury plaintiff is entitled to recover compensation for loss caused to him by wrongful act, including reasonable sum for pain and suffering; *Richmond & D. R. Co. v. Allison*, 86 Ga. 145, 11 L.R.A. 43, 12 S. E. 352, holding that jury should award fair and reasonable compensation for injury, considering what plaintiff would have earned, if he had not been disabled; *Turner v. Boston & M. R. Co.* 158 Mass. 261, holding that in action for personal injuries, necessary expenses of trained nurse to care for plaintiff was proper item of damage; *Rooney v. New York, N. H. & H. R. Co.* 173 Mass. 222, 53 N. E. 435, 6 Am. Neg. Rep. 78 (dissenting opinion), on right to award damages in accident case on basis of annuity; *Stynes v. Boston Elev. R. Co.* 206 Mass. 75, 30 L.R.A. (N.S.) 737, 91 N. E. 998, holding that in action for personal injuries plaintiff may show that he was compelled to hire servants to perform labor formerly done by himself, but may not show the amount he is compelled to pay them; *Bourke v. Butte Electric & P. Co.* 33 Mont. 267, 83 Pac. 470, holding that evidence as to wages received by plaintiff, in action for personal injuries, a year prior to date of accident was admissible; *Chicago, R. I. & P. R. Co. v. Stilbs*, 17 Okla. 97, 87 Pac. 293, holding that in action for personal injuries evidence of average monthly earnings of plaintiff is admissible; *Bateman v. Middlesex County*, 6 D. L. R. 533, holding that income of person injured may be taken into consideration in determining amount of damages caused by injury; *Fox v. St. John*, 23 N. B. 244, holding that in action by husband and wife for injuries to wife, husband may recover for prospective damages resulting from her injury.

Cited in notes in 52 L.R.A. 34, 38, 40, on damages for tort as affected by loss of profits; 5 E. R. C. 525, on measure of damages for carrier's breach of contract.

The decision of the Queen's Bench Division was cited in *Southern Cotton Oil Co. v. Skipper*, 125 Ga. 368, 54 S. E. 110, holding that in action for personal injury reasonable sum is recoverable for pain and suffering, which sum is to be determined by jury; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622 (affirming 66 How. Pr. 161), holding that in action for injury by negligence, evidence as to amount plaintiff was earning, was admissible; *Brown v. Foster*, 1 App. Div. 578, 37 N. Y. Supp. 502, holding that verdict for amount of doctor's bill is inadequate where person injured had been earning \$25 per week and was prevented by injury from working for several weeks; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271, holding that in action for injury to person, plaintiff is entitled to recover expenses of cure, loss of time up to time verdict, and probable future loss from incapacity, and for pain and suffering; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4, holding that in action for personal injuries, mortality tables are admissible to show plaintiff's expectancy of life,

without proving that he was acceptable for insurance; *Reg. v. McLeod*, 8 Can. S. C. 1, on amount of recovery for wrongful death as limited to fair compensation, under all circumstances; *Renwick v. Galt*, P. & H. Street R. Co. 11 Ont. L. Rep. 158, holding that evidence of average duration of life is essential in some cases brought under Lord Campbell's Act; *Price v. Wright*, 35 N. B. 26, holding that loss of prospects of making good marriage as result of dog bite leaving scar on face, could not be taken into consideration in estimating damages caused by injury.

8 E. R. C. 462, *REG. v. STEWART*, 12 Ad. & El. 773, 4 Perry & D. 349.

#### **Dead bodies — Duty to bury.**

Cited in *Griffin v. Condon*, 18 Misc. 236, 41 N. Y. Supp. 380; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Fox v. Gordon*, 16 Phila. 185, 40 Phila. Leg. Int. 374; *R. v. Price*, L. R. 12 Q. B. Div. 247, 53 L. J. Mag. Cas. N. S. 51, 33 Week. Rep. 45, 15 Cox, C. C. 389, 8 Eng. Rul. Cas. 467; *Wright v. Hollywood Cemetery Corp.* 112 Ga. 884, 52 L.R.A. 621, 38 S. E. 94,—on whom the duty of burying dead bodies devolves; *De Festetics v. De Festetics*, 79 N. J. Eq. 488, 81 Atl. 741, holding that court of equity has power to control burial of child, where parents who have been legally separated disagree as to place of burial; *Com. v. Susquehanna Coal Co.* 5 Kulp, 195, holding that at common law it was duty of one under whose roof death occurred to have body decently buried; *Morristown v. Hardwick*, 81 Vt. 31, 69 Atl. 152, to the point that common law casts upon someone duty of carrying to grave, decently covered, body of any one dying and leaving no funds for that purpose.

Cited in notes in 14 L.R.A. 85, on rights and duties as to burial of dead; 12 E. R. C. 9, on derivation of executor's title from will.

#### **—Town or parish duty.**

Cited in *Woolwich v. Robertson*, L. R. 6 Q. B. Div. 654, 50 L. J. Mag. Cas. N. S. 87, 44 L. T. N. S. 747, 29 Week. Rep. 892, 45 J. P. 766, on no common law obligation resting on parishes to bury dead bodies.

#### **—Right to burial.**

Cited in *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Re Flint*, 15 Misc. 598, 38 N. Y. Supp. 188, 1 Gibbons, Sur. Rep. 542; *Re Dixon* [1892] p. 386, 56 J. P. 481; *Gould v. Moulahan*, 53 N. J. Eq. 341, 33 Atl. 483,—on dead body as being entitled to burial; *Re Wong Young Quy*, 6 Sawy. 442, 2 Fed. 624, on neglect to bury dead body as being a misdemeanor at common law.

Cited in note in 42 L.R.A.(N.S.) 212, on improper burial or lack of proper funeral services as criminal offense.

#### **Liability for expenses of burial.**

Cited in *Pache v. Oppenheim*, 93 App. Div. 221, 87 N. Y. Supp. 704, holding a husband paying his wife's funeral expenses is entitled to reimbursement from her estate; *Rappelyea v. Russell*, 1 Daly, 214, holding the administrator of an estate was liable for the expenses incurred by the person burying his intestate; *McClellan v. Filson*, 44 Ohio St. 184, 58 Am. Rep. 814, 5 N. E. 861, holding the estate of a married woman might properly be made liable for her funeral expenses.

Cited in notes in 33 L.R.A. 660, on liability of decedent's estate for funeral expenses; 2 Eng. Rul. Cas. 148, on allowance of funeral expenses to executor or administrator.

**— Property rights in.**

Cited in *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, 4 Legal Gaz. 265, on property rights existing in dead bodies.

**Nature of office of overseer of parish.**

Cited in *R. v. White*, L. R. 11 Q. B. Div. 309, on the nature of the office of an overseer of parish.

8 E. R. C. 467, *REG. v. PRICE*, 15 Cox, C. C. 389, 53 L. J. Mag. Cas. N. S. 51, L. R. 12 Q. B. Div. 247, 33 Week. Rep. 45, note.

**Cremation of dead bodies.**

Cited in *R. v. Stephenson*, L. R. 13 Q. B. Div. 331, 53 L. J. Mag. Cas. N. S. 176, 52 L. T. N. S. 267, 33 Week. Rep. 44, 49 J. P. 486, holding it was a misdemeanor to burn a dead body with intent thereby to prevent the holding upon such body of an intended coroner's inquest; *Re Dixon* [1892] P 386, 56 J. P. 481; *Re Kerr* [1890] P 284, on the cremation of a dead body as not being prohibited by law.

Cited in note in 42 L.R.A.(N.S.) 212, on improper burial or lack of proper funeral services as criminal offense.

**Nuisances.**

Cited in note in 38 L.R.A. 330, on municipal power over nuisances affecting safety, health, and personal comfort.

Cited in *Joyce Nuis.* 13, on what constitutes a nuisance; *Joyce Nuis.* 588, on subject matter of remedy for abatement of nuisance.

8 E. R. C. 479, *McLEAN v. FLEMING*, 1 Asp. Mar. L. Cas. 160, 5 Sc. Sess. Cas. 3d Series, 893, L. R. 2 H. L. Se. App. Cas. 128, 25 L. T. N. S. 317.  
See S. C. 4 E. R. C. 665.

8 E. R. C. 479, *GRAY v. CARR*, 1 Asp. Mar. L. Cas. 115, 40 L. J. Q. B. N. S. 257, L. R. 6 Q. B. 522, 25 L. T. N. S. 215, 19 Week. Rep. 1173.

**Right of shipowner to a lien for dead freight.**

Cited in *Leisy v. Buyers*, 36 La. Ann. 705, holding a condition of charter-party giving a lien for dead freight would only affect a cargo shipped by third persons when the latter expressly or impliedly have consented thereto.

Cited in notes in 70 L.R.A. 363, 374, on what contracts will support maritime lien; 8 E. R. C. 508, on right to lien for freight.

Cited in 2 *Hutchinson Car.* 3d ed. 960, on what charges carrier's lien for freight protects.

**— For demurrage.**

Cited in *The Hyperion's Cargo*, 2 Low. Dec. 93, Fed. Cas. No. 6,987; *Hawgood v. 1,310 Tons of Coal*, 21 Fed. 681,—holding a ship owner has a lien upon the cargo for demurrage enforceable in admiralty, although there is no demurrage clause in the bill of lading; *Dunford v. Webster*, Rap. Jud. Quebec, 6 C. S. 362, holding freight and stipulated charge for detention of vessel recoverable under contract providing for payment of freight and other conditions as per charter party.

Cited in notes in 41 L. ed. U. S. 938, 939, on demurrage; 9 E. R. C. 279, on liability for demurrage under bill of lading stipulating for delivery in accordance with charter party.

Cited in 2 *Hutchinson Car.* 3d ed. 947, on ship owner's lien for demurrage.

**Construction of charter party as to cesser of liability.**

Cited in *Crossman v. Burrill*, 179 U. S. 100, 45 L. ed. 106, 21 Sup. Ct. Rep. 38; *Lovitt v. Snowball*, 32 N. B. 217; *Dunlop v. Balfour* [1892] 1 Q. B. 507, 61 L. J. Q. B. N. S. 354, 66 L. T. N. S. 455, 40 Week. Rep. 371, 7 Asp. Mar. L. Cas. 181; *Marwick v. Rogers*, 163 Mass. 50, 47 Am. St. Rep. 436, 39 N. E. 780 (dissenting opinion),—on the construction of a cesser clause in a charter-party contract: *Burrill v. Crossman*, 65 Fed. 104, to the point that ship's duty to deliver cargo and consignee's duty to receive it, is excused when prevented by major force: *Christoffersen v. Hansen*, L. R. 7 Q. B. 509, 41 L. J. Q. B. N. S. 217, 26 L. T. N. S. 547, 20 Week. Rep. 626, 1 Asp. Mar. L. Cas. 305, holding under provision of charter party that charterer should be free from liability as soon as he had shipped the cargo, the charter remained liable for delay in loading: *French v. Gerber*, L. R. 1 C. P. Div. 737, 45 L. J. C. P. N. S. 880, holding under a provision for cesser of liability of charterers as soon as cargo on board, they were relieved from liability for ordering vessel to an unsafe port where the vessel was delayed: *Diederichsen v. Farquharson Bros.* [1898] 1 Q. B. 150, 67 L. J. Q. B. N. S. 103, 77 L. T. N. S. 543, 46 Week. Rep. 162, 8 Asp. Mar. L. Cas. 133, 3 Com. Cas. 87, 14 Times L. R. 59 (dissenting opinion): *Forsyth v. Sutherland*, 31 N. S. 391,—on the construction of terms of a charter party.

**Incorporation of terms of charter-party into bill of lading.**

Cited in *Serraino v. Campbell*, L. R. 25 Q. B. Div. 501, 60 L. J. Q. B. N. S. 303 [1891] 1 Q. B. 283, 64 L. T. N. S. 615, 39 Week. Rep. 356, 7 Asp. Mar. L. Cas. 48, holding the words "all other conditions as per charter" did not incorporate into the bill of lading the exception of "strandings occasioned by negligence of the master:" *Winchester v. Busby*, 16 Can. S. C. 336 (dissenting opinion): *Cushing v. McLeod*, 2 N. B. Ed. Rep. 63; *Porteus v. Watney*, L. R. 3 Q. B. Div. 534, 47 L. J. Q. B. N. S. 643, 39 L. T. N. S. 195, 27 Week. Rep. 30, 4 Asp. Mar. L. Cas. 34, 9 Eng. Rul. Cas. 269; *Gronstadt v. Withoff*, 22 Blatchf. 360, 21 Fed. 253,—on what necessary to incorporate the terms of a charter-party into a bill of lading.

Cited in *Porter Bills of L.* 56, on provisions in charter party becoming part of bill of lading by reference thereto.

**What covered by demurrage.**

Cited in *Schofield v. Gibson*, 17 N. B. 619, on demurrage as not covering unliquidated damages at the port of loading.

**Parol evidence to contradict bill of lading.**

Cited in note in 11 Eng. Rul. Cas. 233, on parol evidence to contradict bill of lading in written instrument.

8 E. R. C. 512, *NEPEAN v. DOE*, 5 Barn. & Ad. 86, 7 L. J. Exch. N. S. 335, 2 Mees. & W. 894, Murph. & H. 291, 2 Nev. & M. 219, 2 Smith. Lead. Cas. 11th ed. 558.

**Presumption of death from lapse of time.**

Cited in *Doe ex dem. Hagerman v. Strong*, 8 U. C. Q. B. 296 (confirming 4 U. C. Q. B. 510); *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443,—holding an unexplained absence of a person for seven years without being heard of, creates a presumption of death; *Holmes v. Johnson*, 42 Pa. 159, holding a person was rightfully presumed dead where he had not been heard of for a period of thirty years; *State v. Goodrich*, 14 W. Va. 834, holding a presumption of life could be overcome by evidence that seven years had elapsed without the parties being heard from: *R. v. Lumley*, L. R. 1 C. C. 196, 38 L. J. Mag.



Cas: N. S. 86, 20 L. T. N. S. 454, 17 Week. Rep. 685, 11 Cox, C. C. 274, holding an absence for a period less than seven years created no presumption of either life or death, but left it a question of fact for the jury; Hancock v. American L. Ins. Co. 62 Mo. 26; McCartee v. Camel, 1 Barb. Ch. 455; Chapman v. Cooper, 5 Rich. L. 452; Evans v. Stewart, 81 Va. 724; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; Montgomery v. Bevans, 1 Sawy. 653, Fed. Cas. No. 9,735; Edinburgh Life Assur. Co. v. Ferguson, 32 U. C. Q. B. 253; Henderson v. Graves, 2 U. C. Err. & App. 9; Re Phene, L. R. 5 Ch. 139, 39 L. J. Ch. N. S. 316, 22 L. T. N. S. 111, 18 Week. Rep. 303; Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248,—on a presumption of death as arising where a person has not been heard of for seven years; Re Smith, 77 Misc. 76, 136 N. Y. Supp. 825, holding that death of person is to be presumed from mere disappearance when he is never heard of by those, who would naturally hear of him, and where more than seven years have elapsed since his disappearance.

Cited in notes in 2 E. R. C. 93, on right to letters of administration where there is reasonable presumption of death: 8 Eng. Rul. Cas. 547, 550, 551, on presumption of death from absence.

#### **Presumption as to time of death.**

Cited in Bradley v. Modern Woodmen, 146 Mo. App. 428, 124 S. W. 69, holding that there is no presumption regarding date when person died, who has been absent and unheard of for seven years; Eagle's Case, 3 Abb. Pr. 218, 4 Bradf. 117, holding in absence of evidence of time of death of person absent for seven years without being heard from he will be presumed to be dead from the time of expiration of such seven years; Spencer v. Roper, 35 N. C. (13 Ired. L.) 333, holding that where party has been absent seven years, without having been heard of, only presumption arising is, that he is then dead,—there is none as to time of his death; Whiteley v. Equitable Life Assur. Soc. 72 Wis. 170, 39 N. W. 369, holding there was no presumption of life or death at any time within the seven years that the person was not heard of; Re Lewes, L. R. 11 Eq. 236, L. R. 6 Ch. 356, 40 L. J. Ch. N. S. 602, 24 L. T. N. S. 533, 19 Week. Rep. 617, holding the representative of a legatee not heard from for a period of seven years has the burden of proving that his intestate survived the testator who died within seven years after the disappearance of the legatee; State v. Moore, 33 N. C. (11 Ired. L.) 160, 53 Am. Dec. 401; Shown v. McMackin, 9 Lea. 601, 42 Am. Rep. 680; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Doe ex dem. Cole v. Harper, 2 N. B. 450; Re Benham, L. R. 4 Eq. 416, 36 L. J. Ch. N. S. 502, 16 L. T. N. S. 349, 15 Week. Rep. 741; Re Rhodes, L. R. 36 Ch. Div. 586, 56 L. J. Ch. N. S. 825, 57 L. T. N. S. 652; Clarke v. Canfield, 15 N. J. Eq. 119,—on an absence for seven years without being heard from as not creating a presumption as to time of death.

Cited in note in 26 L.R.A.(N.S.) 294, 295, 297, 299, 300, 301, on time of death of one presumed to be dead after seven years' absence.

#### **Sufficiency of evidence to overcome presumption of death.**

Cited in People v. Feilen, 58 Cal. 218, 41 Am. Rep. 258, holding in a trial for bigamy evidence that the first wife was alive about three years prior to the second marriage was insufficient to sustain a verdict of guilty; Re Benjamin, 77 Misc. 434, 137 N. Y. Supp. 758, holding that presumption of death after seven years' absence may be rebutted expressly or by any inherent circumstance; R. v. Debay, 9 N. S. 540, holding a conviction of bigamy could not be sustained

where a woman remarried after her husband had deserted her for seven years, unless proof be had that she had knowledge he was alive.

#### **Presumption as to continuance of life.**

Cited in *Com. v. McGrath*, 140 Mass. 296, 6 N. E. 515, holding evidence that the defendant was prior to the time of the marriage married to a woman who was alive a month before the marriage justified the jury in finding that such woman was living at the time of the marriage; *Arnold v. Auldjo*, 5 U. C. Q. B. 171, holding evidence that a person was alive a few months before a certain date would in the absence of evidence to the contrary create a presumption that he was alive on such date; *Re Aldersley* [1905] 2 Ch. 181, 74 L. J. Ch. N. S. 548, 92 L. T. N. S. 826, on the presumption of the continuance of life of a person shown to be alive at a certain time.

Distinguished in *R. v. Tolson*, L. R. 23 Q. B. Div. 168, 8 Eng. Rul. Cas. 16, 58 L. J. Mag. Cas. N. S. 97, 60 L. T. N. S. 899, 37 Week. Rep. 716, 16 Cox C. C. 629, 54 J. P. 4, holding a wife could not be convicted of bigamy for remarrying where husband was absent less than seven years where she had an honest belief on reasonable grounds of his death.

#### **Title by adverse possession.**

Cited in *Bowen v. Shears*, 8 N. S. 507, holding plaintiffs acquired title to land by adverse possession where they remained in the undisturbed possession of the land for twenty years after defendant's testator executed to plaintiff a deed in trust for their daughter; *Perry v. Henderson*, 3 U. C. Q. B. 486, holding an undisturbed possession for twenty years created a title by adverse possession, although the original possession was adverse to the claims of the true owner; *Doe ex dem. Kimpson v. Craft*, 3 N. B. 546; *Lloyd v. Gillis*, 37 N. B. 190 (dissenting opinion); *Patterson v. McPherson*, 10 N. S. 116; *Griffith v. Brown*, 5 Ont. App. Rep. 303; *Drummond v. Sant*, L. R. 6 Q. B. 763, 41 L. J. Q. B. N. S. 21, 25 L. T. N. S. 419, 20 Week. Rep. 18; *Des Barres v. Shey*, 29 L. T. N. S. 592, 22 Week. Rep. 273; *Law v. Smith*, 4 Ind. 56,—on the acquirement of title to land by adverse possession; *Humphreys v. Helmes*, 10 N. B. 59 (dissenting opinion), on definition of adverse possession; *Collins v. Johnson*, 57 Ala. 304, holding that hostility to title of true owner is indispensable element of title by adverse possession; *Vanduyne v. Hepner*, 45 Ind. 589, holding that since code of 1852 it is not necessary that possession of land should have been adverse for 20 years in order to bar action for possession; *Hanson v. Johnson*, 62 Md. 25, 50 Am. Rep. 199, holding that claim of title and possession of husband, as tenant for life under will not legally executed, being hostile to title of heirs at law was as against them adverse and exclusive; *Cobb v. Davenport*, 32 N. J. L. 369, holding that user to be adverse must be under claim of right against true owner, with such circumstances of notoriety as to afford indication to owner that right is claimed against him; *Tripe v. Marcy*, 39 N. H. 439, holding that possession of mortgagor will not be regarded as adverse, without some equivocal act, hostile to mortgagee's title, and distinctly brought to his knowledge; *Hodgdon v. Shannon*, 44 N. H. 572, holding that payment of taxes is proper test of ownership of land but not conclusive; *Ewing v. Alcorn*, 40 Pa. 492, holding that occupancy by clearing and cultivating land for 21 years would only avail as adverse possession to extent of enclosed territory; *Hollingsworth v. Sherman*, 81 Va. 668; *Satterwhite v. Rosser*, 61 Tex. 166,—holding that possession of land to be adverse must be continuously and persistently so; its charter cannot be changed or abandoned and afterwards renewed at pleasure; *Doe ex dem. Taylor v. Proudfoot*, 9 U. C.

Q. B. 503; *Kearney v. Kearney*, 10 N. S. 428,—to the point that doctrine of nonadverse possession, no longer exists; *Foster v. Emerson*, 5 Grant, Ch. (U. C.) 135, holding that doctrine of nonadverse possession was done away with by statute: *Doe ex dem. Cuthbertson v. McGillis*, 2 U. C. C. P. 124, holding that possession of lessor follows conveyance of estate, and such constructive possession will be presumed to continue until proof of actual entry by stranger or discontinuance by distinct act evincing intention so to do: *Wheelock v. Morrison*, 7 N. S. 332, on question of what constitutes disseisin under statute.

Cited in 1 Washburn. Real Prop. 6th ed. 515, on possession of assignee of tenant at sufferance as adverse.

#### **Statute of limitations as a defence.**

Cited in *McAllister v. Hartzell*, 60 Ohio St. 69, 53 N. E. 715, holding a mere offer to buy within the time of the running of the statute of limitations would not arrest the running of the statute; *Manchester v. Doddridge*, 3 Ind. 360, on the statute of limitations in force when suit in disseizin commenced as governing the case: *Vanduyne v. Hepner*, 45 Ind. 589, on statute of limitations as a defence; *Fiske v. Briggs*, 6 R. I. 557, holding that courts will consider language of statute of limitations, and will make them retrospect or otherwise, as intention of legislature is to be gathered from their language: *McKinnon v. Spence*, 20 Ont. L. Rep. 57, to the point that statute of limitations put end to doctrine of adverse possession.

Distinguished in *State v. Vincennes University*, 5 Ind. 77, where state set up statute of limitations in suit of ejectment against it.

#### **Time of unwitnessed event as question for jury.**

Cited in *Clifford v. Thomaston Mut. Ins. Co.* 50 Me. 197, 79 Am. Dec. 606, holding it a question for the jury to determine the time of the loss of a vessel on which the insurance expired during a voyage from which it never returned or was heard of.

#### **Presumption as to survivorship.**

Cited in *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424 (affirming 12 Hun, 604), holding there was no presumption in law of survivorship in case of persons who perish by a common disaster.

Cited in note in 51 L.R.A. 866, on presumption of survivorship among those perishing in common calamity.

8 E. R. C. 519, *WING v. ANGRAVE*, 8 H. L. Cas. 183, 30 L. J. Ch. N. S. 65, affirming the decision of the Court of Chancery, reported in 4 De G. M. & G. 633, 1 Jur. N. S. 169, 24 L. J. Ch. N. S. 293, 3 Eq. Rep. 794, which affirms the decision of the Master of the Rolls, reported in 23 L. J. Ch. N. S. 982, 2 Week. Rep. 641, 19 Beav. 459.

#### **Presumption of survivorship in common disaster.**

Referred to as leading case in *Middeke v. Blader*, 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002, holding that when two or more persons die in common disaster there is no presumption as to which survived the other.

Cited in *Faul v. Hulick*, 18 App. D. C. 9, holding that common law indulges in no presumption of survivorship of persons who have lost their lives in common disaster: *Re Herrmann*, 75 Misc. 599, 136 N. Y. Supp. 944; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424 (affirming 12 Hun, 604),—holding that



in a common disaster there is no presumption that there is a survivor or that death of all was simultaneous; *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132; *Cowman v. Rogers*, 73 Md. 403, 10 L.R.A. 550, 21 Atl. 64; *St. John v. Andrews Institute*, 117 App. Div. 698, 102 N. Y. Supp. 808; *Re Doherty*, Newfoundl. Rep. (1874-84) 515,—holding there is no presumption that either of two survived the other in a common disaster; *Ehle's Estate*, 73 Wis. 445, 41 N. W. 627; *Young Women's Christian Home v. French*, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 84; *Re Willbor*, 20 R. I. 126, 51 L.R.A. 863, 78 Am. St. Rep. 842, 37 Atl. 634,—holding that the question of survivorship must be regarded as unascertainable in absence of evidence and deaths treated as occurring at same moment; *Re Phillips*, 12 Ont. L. Rep. 48, holding that in absence of evidence, there is no presumption of survivorship of persons who die in same disaster; *Busby v. Ford*, Rap. Jud. Quebec, 3 C. S. 270, on the nonpresumption of survivorship but holding on proofs that husband murdered his wife and then surviving fired his house and killed himself.

Cited in notes in 2 Eng. Rul. Cas. 93, on right of letters of administration where there is reasonable presumption of death; 8 Eng. Rul. Cas. 552, 553, 556, on presumption of death from absence; 51 L.R.A. 867, 868, 870, on presumption of survivorship among those perishing in common calamity.

The decision of the Court of Chancery was cited in *Re Lott*, 65 Misc. 422, 121 N. Y. Supp. 1102; *Smith v. Croom*, 7 Fla. 81,—holding that no presumption of survivorship as between persons killed in same calamity arises.

The decision of the Master of the Rolls was cited in *Dunn v. New Amsterdam Casualty Co.* 63 Misc. 225, 118 N. Y. Supp. 491; *Hartshorne v. Wilkins*, 6 N. S. 276,—holding that no presumption of survivorship arises among persons killed in same calamity.

#### —Disparity in age, strength or sex.

Referred to as leading case in *Faul v. Hulick*, 18 App. D. C. 9, holding that in a disaster which caused the death of a mother and son there is no presumption that one survived the other.

#### Burden of proof of survivorship.

Cited in *Re Loucks*, 160 Cal. 551, 117 Pac. 673, Ann. Cas. 1913A, 868, holding that fact of survivorship as between two persons who were killed in same calamity, must be established by preponderance of evidence; Supreme Council, *R. A. v. Kacer*, 96 Mo. App. 93, 69 S. W. 671; *Fuller v. Linzee*, 135 Mass. 468,—holding that the burden of proof is on the person claiming the survivorship; *Evans v. Stewart*, 81 Va. 724, holding that one who claims by right of survivorship must prove it affirmatively; *Re Phillips*, 12 Ont. L. Rep. 48; *Re Phene*, L. R. 5 Ch. 139, 39 L. J. Ch. N. S. 316, 22 L. T. N. S. 111, 18 Week. Rep. 303,—holding survivorship as a fact supporting title must be affirmatively proved or inferred.

The decision of the Court of Chancery was cited in *Re Greene*, L. R. 1 Eq. 288, 35 L. J. Ch. N. S. 252, 12 Jur. N. S. 70, 13 L. T. N. S. 549, 14 Week. Rep. 192, holding that person claiming estate by virtue of survivorship must show that such person actually did survive.

#### Burden of proof as to time of unwitnessed casualty.

Cited in *Anchor M. Ins. Co. v. Allen*, 13 Quebec L. R. 4, putting burden on insurer to prove loss of vessel more than a year before claim of loss.

#### Construction of will.

Cited in *Langles's Succession*, 105 La. 39, 29 So. 739, holding that courts

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must give effect to expressed not the conjectural, or probable intention of testators: *Rauchfuss v. Rauchfuss*, 2 Dem. 271,—holding it improper to force the construction of a will in order to save a conjectural intention.

The decision of the Court of Chancery was cited in *Re Tredwell* [1891] 2 Ch. 640, 60 L. J. Ch. N. S. 657, 65 L. T. N. S. 399, holding it error for the court to apply a doctrine which would cause the misconstruction of a will, which in its own language is clear, intelligible and not unreasonable.

#### —Dying at same time, survivorship.

Distinguished in *Henning v. Maclean*, 4 Ont. L. Rep. 666, where a provision in case testator and his wife should "die at the same time" was held not to cover their natural deaths a few days apart.

S E. R. C. 554. *DOE EX DEM. BANNING v. GRIFFIN*, 15 East. 293, 13 Revised Rep. 474.

#### Proof of death by general repute.

Cited in *University of North Carolina v. Harrison*, 90 N. C. 385, holding that in the absence of evidence of death of person, inquiry among those most likely to know must appear to raise the presumption of death; *Doe ex dem. Cofer v. Roe*, 1 Ga. 538, holding that where a person goes abroad and is not heard of for a long time, the presumption of death arises from seven years after time when last heard of.

Distinguished in *Jackson ex dem. People v. Etz*, 5 Cow. 314, holding that death of a person may be shown by general report but not that body of a particular individual was found.

#### —By family repute.

Cited in *Re Williams*, 128 Cal. 552, 79 Am. St. Rep. 67, 61 Pac. 670, holding declaration of brother competent and sufficient evidence to sustain finding of death and nonmarriage of his brother; *Barnum v. Barnum*, 42 Md. 251, holding that declarations and statements of a mother made ante litem motam are admissible to prove the illegitimacy of her son's child; *People v. Hill*, 65 Hun. 420, 10 N. Y. Crim. Rep. 213, 20 N. Y. Supp. 187, 47 N. Y. St. Rep. 777, holding that evidence of general repute of death of witness among his relatives is admissible, and testimony given by him in a former trial should be received.

#### Proof of matters of pedigree or the like by general family repute.

Cited in *Eisenlord v. Clum*, 126 N. Y. 552, 12 L.R.A. 836, 27 N. E. 1024, holding declarations of a father are admissible to show legitimacy of his child; *Re Fox*, 9 Misc. 661, 30 N. Y. Supp. 835, holding that the testimony of a nephew in regard to the age of his aunt based on her husband's statement of her age was competent.

Cited in note in 11 Eng. Rul. Cas. 334, on admissibility of declarations of deceased persons on question of pedigree.

Distinguished in *Carter v. Montgomery*, 2 Tenn. Ch. 216, holding that status of pedigree of slaves may be proved by declarations of persons not related to him by blood or marriage; *Re Hurlburt*, 68 Vt. 366, 35 L.R.A. 794, 35 Atl. 77, holding that evidence by members of family, as to family repute not founded on declarations of deceased members of the family is inadmissible to show death of a member.

#### Presumption of death.

Cited in *Luesmann Estate*, 2 Cal. Prob. Dec. (Cal.) 531, holding that death

may be presumed within period less than five years from time of last tidings of absentee, when circumstances leave no other probable conclusion: *Robinson v. Robinson*, 51 Ill. App. 317, holding that from nonclaim of rights or exposure to peculiar sickness, death at period prior to expiration of seven years absence may be inferred; *Cumberland v. Graves*, 9 Barb. 595, holding that where an executor had not been heard from for seven years from time of performing his duty as such, there is no presumption of death and such presumption would only apply where he had left place of his domicile and had not been heard from for seven years.

#### — Without issue.

Cited in *Emerson v. White*, 29 N. H. 482, holding that there is no presumption, from mere absence of evidence, that a person did or did not die childless, and general repute in family is only admissible when coming from competent source; *Re Smith*, 77 Misc. 76, 136 N. Y. Supp. 825, holding that where death of unmarried and childless woman is presumed from disappearance, presumption is that she died unmarried and childless; *Chew v. Tome*, 93 Md. 244, 48 Atl. 701, holding that there is no presumption that person who was absent for seven years without being heard from, died without issue; *Shown v. McMackin*, 9 Lea, 601, 42 Am. Rep. 680, holding that if the person was unmarried when last seen or heard from the presumption of death after seven years carries with it the presumption he died without issue; *Nehring v. McMarrian*, 94 Tex. 45, 57 S. W. 943, holding that upon the presumption of one's early death and the fact that his relatives never heard of his having married, the conclusion is he left no wife or child; *Beigle v. Dake*, 42 U. C. Q. B. 250, holding that one so claiming must prove particular person unmarried and if there be no evidence of the fact nonmarriage will not be presumed; *Burns v. Canada Co.* 7 Grant, Ch. (U. C.) 587, to the point that distribution of estate of person could not be made without proof as to death and as to whether or not he left issue.

Annotation cited in *Hammond v. Inloes*, 4 Md. 138, holding that where one claims title through and by virtue of one dying without issue he must offer negative proof of existence of issue although lapse of time may be prima facie evidence of death; *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698, holding that there is no legal presumption that party died without issue and where it is shown he married and wife was living at time of last intelligence of her, it must be shown that he died without issue or issue is extinct.

Cited in note in 8 Eng. Rul. Cas. 556, 557, on presumption of death without issue.

#### Presumption as to ordinary course of like.

Cited in *Patterson v. M'Causland*, 3 Bland, Ch. 69, on the right of the court to take judicial notice of the regular course of nature in order to ascertain duration of life.

#### Proof of title by descent.

Cited in *Emerson v. White*, 29 N. H. 482, holding that to prove heirship in collateral line, party must show descent of himself and person last seized, from some common ancestor, and extinction of all lines of descent which would claim before him; *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 699, 32 N. E. 10, holding that one claiming collaterally must establish extinction of all all those lines of descent which would be entitled to succeed before him; *Chirac v. Reinecker*, 2 Pet. 613, 7 L. ed. 538, holding that person claiming as heir must prove himself heir of person last seized of estate; *Henriques v. Yale University*, 28 App.

Div. 354, 51 N. Y. Supp. 284, holding that where collateral relative claims as heir, he is bound to plead that all lines of descent which would have right to claim before him are exhausted; *Doe ex dem Place v. Skae*, 4 U. C. Q. B. 369, holding that where plaintiff in ejectment capable of inheriting and prima facie entitled to inherit, makes out reasonable case, court will throw upon defendant who is stranger to title, burden of showing nearer heir; *Des Barres v. Shey*, 8 N. S. 327, holding that no presumption as to title can be indulged as against person in possession of land.

S E. R. C. 558, *MITCHELL v. SIMPSON*, 59 L. J. Q. B. N. S. 355, 63 L. T. N. S. 405, L. R. 25 Q. B. Div. 183, 38 Week. Rep. 565, 55 J. P. 36, affirming the decision of the Queen's Bench Division, reported in 58 L. J. Q. B. N. S. 425, 61 L. T. N. S. 248, L. R. 23 Q. B. Div. 373, 37 Week. Rep. 798, 53 J. P. 694.

#### **Nature of attachment or committal under debtor's acts.**

Cited in *Re Smith* [1893] 2 Ch. 1, 62 L. J. Ch. N. S. 336, 2 Reports. 360, 68 L. T. N. S. 337, 41 Week. Rep. 289, 57 J. P. 516, 8 Eng. Rul. Cas. 567, on commitment under Debtor's Acts as being punitive in nature.

The decision of the Queen's Bench Division was cited in *Re Edye* [1891] W. N. 1, holding an attachment would issue under the Debtor's Acts against a solicitor who had become bankrupt for default in the payment of money; *Teasdall v. Brady*, 18 Ont. Pr. Rep. 104, on imprisonment for contempt on failure to appear upon after-judgment summons as punishment or execution; *Reid v. Graham Bros.* 26 Ont. Rep. 126, holding that order of committal under judgment summons provisions of Division Court Act is not process of contempt, but is in nature of execution.

S E. R. C. 567, *RE SMITH* [1893] 2 Ch. 1, 57 J. P. 516, 62 L. J. Ch. N. S. 336, 68 L. T. N. S. 337, 41 Week. Rep. 289.

#### **Punitive nature of attachment or committal under debtor's acts.**

Cited in *Ex parte Van Wart*, 35 N. B. 78, holding that process of attachment which may be issued against judgment debtor for contempt of court, is punitive or criminal in its nature; *Re Edgecome* [1902] 2 K. B. 403, 71 L. J. K. B. N. S. 722, 50 Week. Rep. 678, 87 L. T. N. S. 108, 18 Times L. R. 734, 9 Manson, 227, holding a commitment under the Distress for Rates Act was a punitive order and not a legal process to enforce payment; *Church v. Hibbard* [1902] 2 Ch. 784, 87 L. T. N. S. 412, 72 L. J. Ch. N. S. 46, 51 Week. Rep. 293, holding an order for attachment made under the Debtor's Acts was punitive in nature; *Re Bourne* [1906] 1 Ch. 697, 75 L. J. Ch. N. S. 474, 94 L. T. N. S. 750, 22 Times L. R. 417, on punishment by attachment of debtor, appointed executor of his creditor, who fails to pay debt when so ordered although he has the means to do so.

#### **Liability of trustee.**

Cited in *Simpson v. Johnston*, 2 N. B. Eq. 333, holding that executors of estate who though guilty of breach of trust, had not acted unreasonably in view they took of meaning of will, should be relieved from personal liability; *Fawkes v. Griffin*, 18 Ont. Pr. Rep. 48, holding that specific order to pay over balance is proper course in first instance, in proceeding to compel receiver to pay money into court.

8 E. R. C. 577, *CLAVERING v. CLAVERING*, 7 Bro. P. C. 410, 1 Eq. Cas. Abr. 24, pl. 6, *Prec. in Ch.* 235, 2 Vern. 473.

### **Effect of retention of deed by grantor.**

Cited in *Frisbie v. McCarty*, 1 Stew. & P. (Ala.) 56, holding it renders deed void; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235, holding it will not of itself affect deed's validity unless it be understood at time of execution that it is not to pass out of possession of grantor; *Doe ex dem. Garnons v. Knight*, 8 E. R. C. 580, 5 Barn. & C. 671, 8 Dowl. & R. 348, holding mere physical retention of the deed after delivery did not impair it.

### **—Voluntary settlement deeds.**

Cited in *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35, holding deed of voluntary settlement binding if not tainted with fraud nor intended not to be delivered; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400, holding retention of deed by donor will not invalidate it unless there be clear and decisive proof that he never parted or intended to part with its possession; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Souverybye v. Arden*, 1 Johns. Ch. 240; *Roosevelt v. Carow*, 6 Barb. 190,—holding retention of voluntary settlement will not invalidate it unless there be circumstances besides mere fact of retention to show it was not intended to be absolute; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147, holding retention of voluntary settlement will not invalidate it, if the grantor intended it to be considered as delivered; *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178, holding retention of voluntary deed of settlement, if intended to operate as assignment and capable of passing title, does not invalidate it; *Reed v. Douthit*, 62 Ill. 348, holding possession of voluntary settlement by grantor does not invalidate it, where grantee has exercised acts of ownership; *Cline v. Jones*, 111 Ill. 563 (dissenting opinion), on necessity for actual delivery in voluntary settlement.

### **Power to revoke voluntary settlement.**

Cited in *Hildreth v. Eliot*, 8 Pick. 293, holding where no power of revocation is reserved and deed is fairly made, it cannot be set aside by settler or by court on his application; *Re Jones* [1893] 2 Ch. 461, 62 L. J. Ch. N. S. 996, 3 Reports, 498, 69 L. T. N. S. 45, on estate conveyed by voluntary settlement.

Cited in note in 15 L.R.A. 75, on power to revoke or set aside voluntary trust or settlement.

Cited in 1 Beach, *Trusts*, 160, on power to revoke trust.

### **—Effect of subsequent deed.**

Cited in *Bethume v. Beresford*, 1 Desauss, Eq. 174, holding where no power of revocation is retained, deed of settlement not invalidated by execution of subsequent one; *Way v. Lyon*, 3 Blackf. 64, holding failure to record voluntary conveyance does not invalidate it as against subsequent voluntary conveyance by grantor.

### **Irrevocable effect of execution and delivery of deed.**

Cited in *Wiley v. Christ*, 4 Watts, 196, holding where deed has been executed and delivered to grantee, a subsequent cancellation of deed will not divest his title; *Botsford v. Morehouse*, 4 Conn. 550, holding where grantee receives deed and goes into possession, a subsequent return to and cancellation of deed by grantor does not divest grantee's title; *Chessman v. Whittemore*, 23 Pick. 231, holding where by transmutation of possession title under deed has become vested, it will not be divested by subsequent material alteration in deed; *Morgan v. Elam*, 4 Yerg. 375,—holding where title has once vested, cancellation of deed



will not divest title; *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 348, holding title vested by execution and delivery of deed not affected by subsequent delivery; *Churchill v. Capen*, 84 Vt. 104, 78 Atl. 734, holding that fraudulent alteration of deed by grantee after execution and delivery does not reinvest title in grantor, but will defeat action on covenant in deed; *Houlding v. Poole*, 2 Grant, (Ch. (U. C.)) 685, holding that voluntary deed even though delivered and recorded will not prevail over prior mortgage; *Lloyd v. Giddings*, 7 Ohio, pt. 2, p. 50, holding that what delivery of deed is to be taken as effectual, and what mere escrow depends on circumstances attending delivery.

#### **Requisites and sufficiency of delivery of deed.**

Cited in *Bryan v. Wash*, 7 Ill. 557, holding delivery of voluntary settlement to third person for benefit of grantee sufficient; *Hulick v. Scovil*, 9 Ill. 159, holding taking of auditor's certificate based on tax sale in name of one without his knowledge or consent, does not constitute delivery and acceptance; *McCullough v. Day*, 45 Mich. 554, on presumption of delivery where deed is executed, acknowledged, held in readiness for delivery and no hindrance of delivery is shown; *Wallace v. Birdell*, 97 N. Y. 13, holding where trust deed was duly and jointly executed and acknowledged by grantor and grantee, containing acceptance of trust by grantee, and acts done by parties thereafter with reference to deed, the deed on death of trustee being found in possession of cestui que trustent, delivery sufficiently established; *Duraind's Appeal*, 116 Pa. 93, 8 Atl. 922, 20 W. N. C. 17, holding where deed, though signed and sealed, was found in personal effects of deceased grantor, no delivery is shown; *Seibel v. Rapp*, 85 Va. 28, 6 S. E. 478, holding delivery sufficient where trust deed is formally signed, sealed and acknowledged by grantor and formally accepted by trustee, though deed is found cancelled among papers of grantor; *Adams v. Adams*, 21 Wall. 185, 22 L. ed. 504, 7 Legal Gaz. 25, holding, signing, sealing, acknowledging and recording deed of trust show delivery; *Brown v. Brown*, 1 Woodb. & M. 325, Fed. Cas. No. 1,994, holding deed from father to son and lodged with third person until death of father, sufficiently delivered.

Disapproved in *Osborne v. Eslinger*, 155 Ind. 351, 80 Am. St. Rep. 240, 58 N. E. 439, holding placing of deed made in contemplation of death in hands of agent of grantor to be delivery to administrator of estate insufficient delivery.

#### **Necessity for delivery of deed.**

Cited in *Woodward v. Woodward*, 8 N. J. Eq. 779, holding there must be a delivery or some act equivalent thereto, or a clear intention on part of grantor, coupled with acts or words evincing such intent, to consummate transaction and part unconditionally with right; *Duraind v. Dyck*, 18 Phila. 292, 43 Phila. Leg. Int. 37, holding actual or constructive delivery essential.

Cited in note in 8 E. R. C. 591, 593, 597, on taking effect of deed from date of execution.

8 E. R. C. 580, *DOE EX DEM. GARNONS v. KNIGHT*, 5 Barn. & C. 671, 8 Dowl. & R. 348, 4 L. J. K. B. 161, 29 Revised Rep. 355.

#### **Requisites and sufficiency of delivery of deed.**

Cited in *Hennel v. Weyant*, 2 Harr. (Del.) 501, holding that deed acknowledged and recorded will not pass title if it was never delivered or intended to be delivered; *Hulick v. Scovil*, 9 Ill. 159, holding that proof of acceptance of deed at a time subsequent to the delivery is not sufficient to give validity to deed; *Brown v. Brown*, 66 Me. 316, holding to constitute valid delivery grantor must part with all right of possession and dominion over instrument with intent that

it shall take effect as his deed; *Neall v. Waddill*, 78 Miss. 16, 27 So. 936, holding to be valid delivery grantor must part so absolutely and irrevocably with all dominion over deed as never thereafter to have right to recall it; *Warren v. Swett*, 31 N. H. 332, holding delivery valid and complete when grantor has parted with dominion over it with intent that it shall pass to grantee, and grantee has assented to it; *Derry Bank v. Webster*, 44 N. H. 264, on necessity for surrender of control to make valid delivery; *Baldwin v. Maultsby*, 27 N. C. (5 Ired. L.) 505, holding that where there has been no delivery of deed in lifetime of grantor, delivery after his death, is void; *Kirkman v. Bank of America*, 2 Coldw. 397, holding delivery complete when grantor parts with dominion of instrument with intent that it pass to grantee and latter assents thereto; *Seibel v. Rapp*, 85 Va. 28, 6 S. E. 478, holding that grantor in deed of trust could not revoke deed after he had signed, sealed and acknowledged it in due form, and procured trustee's acceptance in same way; *Bogie v. Bogie*, 35 Wis. 659, holding where mutual deeds are signed, sealed and acknowledged before proper officer, both parties understanding deeds are to take effect at once, and consideration paid, delivery consummated when officer hands to each party deed running to him.

Cited in 1 *Beach Contr.* 88, on English doctrine of proposals in deeds; 1 *Mechem Sales*, 239, on irrevocability of offer of sale under seal.

#### — Constructive delivery.

Cited in *Mehure v. Colelough*, 17 Ala. 89, holding it may be accomplished by words and actions indicating clear intention that deed shall be considered as executed; *McCullough v. Day*, 45 Mich. 554, 8 N. W. 535, holding delivery valid where deed is sealed and acknowledged, is in readiness for delivery and no hindrance prevents the minds of the parties having met, and the intention of both is that deed shall take effect; *Huey v. Huey*, 65 Mo. 689, holding mere lodgment of properly executed and acknowledged deed by grantor in place to which grantee has access and from which he can remove deed without hindrance does not constitute delivery, where grantor intends that after his death grantee may record deed and become owner of land; *Crawford v. Bertholf*, 1 N. J. Eq. 458, holding delivery not made where both parties are present and intention is to deliver deed on presumption of present consummation of contract, but where intention is openly abandoned and it is distinctly stated delivery would not be made at time; *Le Roy v. Clayton*, 2 Sawy. 493, Fed. Cas. No. 8,268,—holding recording of patent from government a valid constructive delivery; *Linton v. Brown*, 20 Fed. 455, 14 Pittsb. L. J. N. S. 431, holding where transaction on part of grantee is fully consummated a formal sealing and delivery without actual delivery sufficient to make instrument effective, in absence of qualifying circumstances.

#### — Conditional or suspended delivery.

Cited in *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426, holding deed void where delivery depends on condition precedent to be performed after death of grantor; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369, holding that grantor may avoid deed on plea of non est factum, where grantee obtained possession of it before happening of event which was to give it effect; *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. ed. 903, holding delivery of deed of assignment for benefit of creditors to proper officer to be recorded, there being no conditions attached to deed, constitutes valid delivery; *Hammond v. Hunt*, 4 Bann. & Ard. 111, Fed. Cas. No. 6,003, holding delivery of license under patent to third party

to be recorded on happening of contingency and their subsequent record on such happening constitute valid delivery.

Cited in note in 8 Eng. Rul. Cas. 621, on conditional delivery of deed.

### —Delivery to third person.

Referred to as leading case in *Roe v. Lovick*, 43 N. C. (8 Ired. Eq.) 88, holding delivery to third person where grantor retains control, invalid.

Cited in *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315, holding delivery to third person for benefit of grantee valid; *Stewart v. Weed*, 11 Ind. 92, holding delivery to third person valid, an agent of grantee being present and assenting thereto; *Hockett v. Jones*, 70 Ind. 227, holding delivery to third person for benefit of grantee valid; *Squires v. Summers*, 85 Ind. 252, holding handing to son of deed, from father to wife of son, with instructions to deliver to a third person to be recorded on death of grantor, constituted valid delivery; *Thatcher v. St. Andrew's Church*, 37 Mich. 264, holding delivery to third person to be thereafter delivered to grantee, where grantee afterward assents, valid; *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714, holding delivery of curative deed direct to beneficiary valid delivery, though delivery is never made to grantee named in deed; *Martin v. Flaharty*, 13 Mont. 96, 19 L.R.A. 242, 40 Am. St. Rep. 415, 32 Pac. 287, holding where grantor conveys and takes back lease from grantee, and deposits both instruments with third party with instructions to deliver deed on her death, valid delivery established; *Parker v. Dustin*, 22 N. H. 424, holding delivery to third person valid where grantor parts with all control over deed; *Cook v. Brown*, 34 N. H. 460, holding placing deed in hands of depositary to be delivered to grantee on death of grantor, with reservation of right of recall by grantor, not a valid delivery; *Cannon v. Cannon*, 26 N. J. Eq. 316, holding delivery not consummated where grantor left deeds with his wife, who joined therein, there being no evidence to show intention to transfer title or deliver deed; *Schlicher v. Keeler*, 61 N. J. Eq. 394, 48 Atl. 393, holding delivery to third person for benefit of grantee, with no power of control in grantor, constituted valid delivery; *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637, holding that delivery of deed of trust by grantor to recorder for record, for grantee and as their deed, is sufficient delivery, where there was agreement to accept such deed; *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478, holding delivery valid where grantor executes and acknowledges deed before magistrate and leaves it with him without instructions; *Hunt v. Brent*, 1 Va. Dec. 258, holding delivery to third person valid where grantor parts with dominion over instrument; *Brown v. Brown*, 1 Woodb. & M. 325, Fed. Cas. No. 1,994, holding where father executes deed to son and takes back lease, and deposits instruments with third person to be recorded at death of grantor, delivery is valid; *Re Seaman*, 6 N. S. 185, on validity of delivery to third person to be delivered to grantee on death of grantor; *Nelson Coke & Gas Co. v. Pellatt*, 4 Ont. L. Rep. 481, holding delivery to agent in behalf of principal, valid; *Muirhead v. McDougall*, 5 U. C. Q. B. O. S. 642, holding delivery to third person for use of grantee, with intention to part with possession and control of deed, valid delivery; *Doe ex dem. Chiverie v. Knight*, 1 Has. & W. (Pr. Edw. Isl.) 448, holding delivery to third person, with assent of grantee, the grantor parting with all dominion, valid; *Young v. Hubbs*, 15 U. C. Q. B. 250, holding that deed may be effectual to pass title where it is delivered in escrow, if all conditions are met; *Xenos v. Wickham*, 13 E. R. C. 422, 33 L. J. C. P. N. S. 13, 36 L. J. C. P. N. S. 313, 14 C. B. N. S. 452, L. R. 2 H. L. 296, on necessity of an agency to accept a deed.



Cited in note in 54 L.R.A. 877, 904, on delivery of deed to third person; or record, or delivery for record, by grantor.

Criticized in *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592, holding delivery to third person, to deliver on contingency, but not beyond absolute control of grantor, does not constitute valid delivery.

— **Deposit without present knowledge or assent by grantee.**

Cited in *Elsberry v. Boykin*, 65 Ala. 336, holding signing, sealing and acknowledgment of execution, and delivery for registration constitute valid delivery to grantee though he be ignorant thereof at time; *Foley v. Howard*, 8 Iowa, 56, holding delivery of mortgage not established where it is handed to register for record but mortgagee disclaims knowledge of and all rights or claims of advantage under it; *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. 855, holding delivery to third person for use of grantee and record of instrument, although deed is without the knowledge of grantee, valid if grantee assent, if rights of creditors have not intervened; *Rose v. Rose*, 7 Barb. 174, holding delivery of deed to third person to be proved and recorded, the grantor surrendering all control, and grantee assenting to conveyance, constitute valid delivery; *Lawrence v. Farley*, 24 Hun, 293, holding unconditional delivery of deed by grantor to officer for record valid delivery to grantee, if not dissented to by him thereafter; *Messelback v. Norman*, 46 Hun, 414, holding delivery to third person to have deed recorded, valid delivery as to grantee where plainly beneficial to grantee; *Duriand v. Dyck*, 18 Phila. 292, 43 Phila. Leg. Int. 37, holding where deed is executed and acknowledged but possession and control thereof retained by grantor without communication to grantee, no delivery is established; *Roanes v. Archer*, 4 Leigh, 550, holding acknowledgment of deed in open court and an order thereupon for its record, a valid delivery where grantee afterward assents; *Cooper v. Jackson*, 4 Wis. 537, holding delivery of deed to register to be recorded for use of grantee who assents thereto constitute valid delivery; *Withers v. Jenkins*, 6 S. C. 122, holding where voluntary deed of trust is "signed, sealed and delivered" in presence of witness, but in absence of grantee, and handed to witness to be proved and recorded, delivery is complete as to cestui que trust though grantee refuse to execute trust; *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557, holding where maker of voluntary trust deed hands it to trustee who communicates fact to cestui que trust, but subsequently refuses to execute trust and returns deed, delivery to such trustee is effective; *Gammon v. Jodrey*, 11 N. S. 314, holding recording of instrument without knowledge of grantee, but to which he afterward consents, valid; *McDonnell v. McMaster*, 15 N. S. 372, holding mere record of instrument where there is no evidence of its delivery therefor by grantor nor of knowledge or assent by grantee, not sufficient to establish delivery.

Distinguished in *Day v. Griffith*, 15 Iowa, 104, holding delivery of deed to recorder for record without knowledge or consent of grantee does not constitute delivery as against intervening attaching creditors.

— **Retention of deed by grantor or resumption of possession of it.**

Cited in *Provart v. Harris*, 150 Ill. 40, 36 N. E. 958, holding no valid delivery effected where grantor retains deeds but gives instructions to third person that in event of his death deeds are to be recorded; *Osborne v. Eslinger*, 155 Ind. 351, 80 Am. St. Rep. 240, 58 N. E. 439, holding delivery invalid where deeds are delivered to third person but control is retained by grantor over same; *Moore v. Hazelton*, 9 Allen, 102, holding execution of deed in presence of attesting witness, with intention on part of grantor that it shall operate immediately,



with nothing to qualify delivery but retention of deed by grantor, sufficient evidence from which delivery may be inferred; *Bisard v. Sparks*, 133 Mich. 587, 95 N. W. 728, holding where grantor retains possession and control, delivery is invalid; *Stockwell v. Williams*, 68 N. H. 75, 41 Atl. 973, holding delivery ineffectual where grantor retains control over instrument; *Scrugham v. Wood*, 15 Wend. 545, 30 Am. Dec. 75, holding deed in nature of family settlement prepared, read, signed by both parties and acknowledged as their deed before proper officer, binding although no formal delivery take place and deed is on death of grantor found among his effects; *Stillwell v. Hubbard*, 20 Wend. 44, holding delivery ineffective where deed is acknowledged before officer but is retained by grantor with intention that it shall not take effect until his death, the grantee not being present at time of execution of deed; *Fisher v. Hall*, 41 N. Y. 416, holding where deed is subscribed and sealed and attested by witnesses, but grantee being absent, the retention of the deed and possession of premises by grantor, prevents valid delivery; *Roosevelt v. Carow*, 6 Barb. 191, holding no delivery effected where grantor retains control of instrument, without disclosing existence thereof to grantee and for long period retains possession and control of property as his own; *Kerper v. Gressinger*, 26 Phila. Leg. Int. 44, holding that after deed of trust is executed and delivered, custody of same by grantor does not render it inoperative; *Payne v. Hallgarth*, 33 Or. 430, 54 Pac. 162, holding that delivery of deed to grantee is sufficient, although immediately after deed is returned to grantor; *Baldwin v. Maultsby*, 27 N. C. (5 Ired. L.) 505, holding where deed is signed, sealed and acknowledged before witnesses who attested it, but grantor retains possession thereof, and thereafter states it is to take effect on his death, no valid delivery effected; *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351, holding delivery to third person which is conditional, not binding where deed subsequently without consent, of grantor comes into grantee's hands; *Lang v. Smith*, 37 W. Va. 725, 17 S. E. 213, holding where grantor retains possession of and also control over deed, delivery not consummated.

Criticized in *Oliver v. Stone*, 24 Ga. 63, holding where grantor signed, sealed and acknowledged deed of property to his children, in presence of witnesses and stated instrument was his deed, but took deed into his possession and retained it, delivery not established.

#### **Effect of retention of deed by grantor.**

Cited in *Stevens v. Hatch*, 6 Minn. 64, Gil. 19, holding where party executes and acknowledges deed afterward expresses his intention that same is for use of grantee, and grantee assents thereto, title conveyed though deed remain in hands of grantor; *Smith v. Hawthorn*, 22 Pa. Co. Ct. 519, holding where husband assigns life insurance policy to wife and children and subscribing witness attests its sealing and delivery, fact that it is found in his effects after his death does not invalidate assignment; *McLean v. Button*, 19 Barb. 450, holding retention of instrument by grantor, whose object is to make family settlement, said instrument having been executed by both parties and usual formalities having taken place, not invalidated thereby; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147, holding mere retention of voluntary settlement will not invalidate it, if grantor intend it to be considered as executed and delivered; *Cline v. Jones*, 111 Ill. 563, holding retention of voluntary settlement by grantor does not invalidate it where circumstances aside from such retention do not show the grantor did not intend it to operate immediately; *Frishie v. McCarty*, 1 Stew. & P. (Ala.) 56, holding retention of deed and declarations by grantor of intention not to deliver at time of execution renders it void; *Duraind's Appeal*, 116 Pa. 93, 8 Atl. 922,

on effect of retention of deed by grantor, the grantee having paid no consideration; *Clinch v. Pernette*, 24 Can. S. C. 385, on effect of retention of instrument with binding indorsement thereon; *Kelly v. Imperial Loan Co.* 11 Ont. App. Rep. 526, on effect of retention where circumstances show intention to pass title; *Zwicker v. Zwicker*, 29 Can. S. C. 527, holding that fact that deed, after it has been signed and sealed by grantor, is retained in latter's possession, is not sufficient evidence that it was never so delivered as to take effect as duly executed instrument.

Cited in note in 18 Eng. Rul. Cas. 54, on mortgagor retaining possession as a fraud on creditors.

#### **Intention to deliver as fact question.**

Cited in *Clark v. Gifford*, 10 Wend. 310, holding it question of fact for jury; *Alexander v. Alexander*, 71 Ala. 295, holding question is one of intention with which acts were performed; *Hastings v. Vaughn*, 5 Cal. 315, holding it is a question of fact, depending on intention of parties, to be determined by jury; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, holding question one of fact.

#### **Presumption of assent of grantee.**

Cited in *Gibson v. Cubitt*, 5 U. C. Q. B. O. S. 711; *Lawrence v. Lawrence*, 24 Mo. 269; *Le Roy v. Clayton*, 2 Sawy. 493, Fed. Cas. No. 8,268,—holding assent presumed where grant is beneficial; *Boulton v. Ruttan*, 2 U. C. Q. B. O. S. 396, on presumption of assent to beneficial act; *Campbell v. Kuhn*, 45 Mich. 513, 40 Am. Rep. 479, 8 N. W. 523, holding delivery to imbecile grantee valid; *Tate v. Tate*, 21 N. C. (1 Dev. & B. Eq.) 22, holding assent of infant grantee presumed; *Porter v. Munger*, 22 Vt. 191, holding assent presumed to instrument apparently to interest of grantee.

Distinguished in *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473; *Johnson v. Farley*, 45 N. H. 505; *Bell v. Hays*, 11 Bush, 34,—holding presumption will not arise as against intervening attaching or lien creditors.

Disapproved in *Welch v. Sackett*, 12 Wis. 244, holding delivery of chattel mortgage to third person for use of mortgagee but without his knowledge or assent not valid as against intervening attachment creditors.

#### **Presumption of intention to consummate transaction.**

Cited in *Jamison v. Craven*, 4 Del. Ch. 311, holding intention presumed where conveyance is absolute on its face and is for valuable consideration, the grantor having parted with possession of conveyance; *Routledge v. Routledge*, 30 N. S. 151, on possession of instrument of conveyance by third person as evidence on intention to reduce to possession.

#### **Deed when takes effect.**

Cited in *Dettmer v. Behrens*, 106 Iowa, 585, 68 Am. St. Rep. 326, 76 N. W. 853, holding deed delivered absolutely to depositary and not placed in hands of grantee until death of grantor, relates back to time of such delivery to depositary; *Skipwith v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642, holding deed of trust takes effect from time of execution by grantor and trustee; *First Nat. Bank v. Holmes, L. & Co.* 4 W. N. C. 449, 34 Phila. Leg. Int. 408, holding assignment for benefit of creditors operates from time it is placed in office of recorder for record; *Rindlemann v. Willard*, 15 Mo. App. 375, holding recording of deed of assignment for benefit of creditor binding from date of record whether assignee accepts trust or not; *Marks's Appeal*, 85 Pa. 231, holding assignment for benefit of creditors takes effect from time it is placed in proper office for record, in proper time, whether accepted by assignee or not; *Jacobus v. Mutual*

Ben. L. Ins. Co. 27 N. J. Eq. 604, holding in equity mortgage when delivered will have relation to the agreement for loan; *Jones v. Swayze*, 42 N. J. L. 279, holding delivery to third person for use of grantee, with no power of control in grantor, makes deed effective from time of delivery; *Wesson v. Stephens*, 37 N. C. (2 Ired. Eq.) 557; *Congregational Nunnery v. McNamara*, 3 Barb. Ch. 375,—holding where deed is delivered to third person for benefit of grantee who assents thereafter, it takes effect from date of such delivery; *Brown v. Austin*, 22 How. Pr. 394, 35 Barb. 341, holding deed takes effect from time of its unconditional delivery by grantor, though such delivery be to a third person, where grantee assents; *Stephens v. Beatty*, 27 Ont. Rep. 75, holding where unqualified delivery is made to third person in behalf of grantee, deed takes effect from such delivery.

Cited in note in 8 E. R. C. 593, 596, 597, on taking effect of deed from date of execution.

#### **Conveyance fraudulent as to creditors, how attacked.**

Cited in *Sun L. Assur. Co. v. Elliott*, 31 Can. S. C. 91 (dissenting opinion), on procedure in suit to set aside conveyance as fraudulent.

8 E. R. C. 599, *BOWKER v. BURDEKIN*, 12 L. J. Exch. N. S. 329, 11 Mees. & W. 128.

#### **Delivery of deed.**

Cited in *Huggard v. Ontario & S. Land Co.* 1 Sask. L. R. 526, holding that delivery is entirely matter of intention on part of party executing deed, and actual delivery is not essential.

#### **— Conditional delivery.**

Cited in *Gudgen v. Besset*, 8 E. R. C. 612, 26 L. J. Q. B. N. S. 36, 6 El. & Bl. 986, 3 Jur. N. S. 212, holding no delivery when lease is executed under agreement that it is not to be delivered until payment of rent and payment is not made.

Cited in note in 8 E. R. C. 619, on conditional delivery of deed.

#### **Escrow by parol agreement.**

Cited in *Humphreys v. Richmond & M. R. R. Co.* 88 Va. 431, 13 S. E. 985; *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119,—holding it may be established by parol evidence; *O'Connor v. Beaty*, 27 U. C. C. P. 203, holding facts and surrounding circumstances may be looked to, to ascertain intention of parties; *Street v. Hogeboom*, 3 Grant. Ch. (U. C.) 128, holding it may be established from all the surrounding circumstances.

#### **Elements necessary to constitute escrow.**

Cited in *Naylor v. Stine*, 96 Minn. 57, 104 N. W. 685, holding deposit of contract with third person to be delivered on performance of condition, creates escrow; *Southern L. Ins. & T. Co. v. Cole*, 4 Fla. 359, holding formal notification at time of deposit that it is to operate as escrow, not material; *Trust & Loan Co. v. Ruttan*, 1 Can. S. C. 564, holding it not essential that express words be used; *Huron v. Armstrong*, 27 U. C. Q. B. 533; *Sun Life Assur. Co. v. Page*, 15 Ont. App. Rep. 704; *Keator v. Scovil*, 5 N. B. 647,—holding delivery need not be by express words, if from circumstances attending execution it can reasonably be inferred that delivery was conditional; *Coleman v. Sherwood*, 3 U. C. C. P. 372, as to what constitutes escrow; *Trust & Loan Co. v. Covert*, 1 Ont. App. Rep. 26 (dissenting opinion), on what constitutes delivery as escrow.

#### **Effect of execution of instrument by partner individually.**

Cited in *R. v. McNaney*, 5 Ont. Pr. Rep. 438, holding it binds partner so executing; *McClary Mfg. Co. v. H. S. Howland Sons & Co.* 9 B. C. 479, on effect

on partner's individual rights by unauthorized execution by him of instrument for firm.

Cited in *Parsons Partn.* 4th ed. 154, on liability of partner affixing seal for firm.

**—As an act of bankruptcy.**

Cited in *Ex parte Snowball*, L. R. 7 Ch. 534, 41 L. J. Bankr. N. S. 49, 26 L. T. N. S. 894, 20 Week. Rep. 786, holding execution of deed applying partnership property in satisfaction of debt, an act of bankruptcy.

**Effect of adjudicating a partner a bankrupt.**

Cited in *Nicholson v. Baird*, N. B. Eq. Cas. 195, holding it dissolves partnership and transfers rights of bankrupt partner to trustee.

Cited in note in 4 Eng. Rul. Cas. 121, on respective rights of joint and separate creditors of bankrupt partnership.

8 E. R. C. 612, *GUDGEN v. BESSET*, 6 El. & Bl. 986, 3 Jur. N. S. 212, 26 L. J. Q. B. N. S. 36, 5 Week. Rep. 47.

**Escrow implied from circumstances.**

Cited in *Trust & Loan Co. v. Ruttan*, 1 Can. S. C. 564, holding it may be shown by surrounding circumstances; *O'Connor v. Beaty*, 27 U. C. C. P. 203, holding facts and surrounding circumstances may be looked at to see what intention of parties is.

**Requisites of delivery as escrow.**

Cited in *Huron v. Armstrong*, 27 U. C. Q. B. 533, holding express words not necessary, but may be constituted by facts and circumstances attending execution; *Benedict v. Rutherford*, 11 U. C. C. P. 213, holding escrow not created where performance of a condition is entirely disconnected with delivery and independent of it.

**Conditional delivery of writing.**

Cited in *Benjamin Sales* 5th ed. 80, on acceptance of offer dependent upon extrinsic fact.

**—Admissibility of evidence to show.**

Cited in *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816, holding in suit on promissory note between immediate parties, evidence admissible to show parol agreement that delivery was conditional; *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119, holding parol evidence admissible to show execution of instrument was on condition that it was not to operate until the performance of some prescribed act; *Pattle v. Hornibrook* [1897] 1 Ch. 25, 66 L. J. C. H. N. S. 144, 75 L. T. N. S. 475, 45 Week. Rep. 123, holding it admissible to show parties came to no agreement.

8 E. R. C. 622, *STEIGLITZ v. EGGINTON*, Holt, N. P. 141, 17 Revised Rep. 620.

**Necessity of sealed authority to execute sealed writing.**

Cited in *Warring v. Williams*, 8 Pick. 326, holding agent who affixes seal to instrument of principal must have authority therefor, and instrument is not binding on principal in absence thereof; *Blood v. Goodrich*, 9 Wend. 68, 24 Am. Dec. 121, holding instrument not binding on principal unless authority to execute is under seal.

Cited in note in 8 E. R. C. 629, 632, 633, on requisites of power of attorney to execute deed under seal.



**Authority of partner to bind firm.**

Cited in *Smith v. Kerr*, 3 N. Y. 144, holding contract relating to partnership business executed by one of several partners binding on all if they assent thereto; *Gram v. Seton*, 1 Hall, 293, holding that instrument under seal executed by one partner in name of both was binding on partnership; *Taylor v. Coryell*, 12 Serg. & R. 243, on effect on firm of execution of unsealed contract by one partner.

Cited in note in 28 L.R.A. 90, on rights of partners *inter se* in partnership realty.

Cited in *Parsons Partn.* 4th ed. 150, on power of partner to affix a seal.

**— Assent of other partners.**

Cited in *Smith v. Crooker*, 5 Mass. 338, holding subsequent assent makes instrument binding.

Disapproved in *Cady v. Shepherd*, 11 Pick. 400, 22 Am. Dec. 379, holding one partner may bind firm by instrument under seal if they assent thereto, which may be expressed by parol.

**Effect of subsequent parol recognition or acknowledgment of unauthorized writing.**

Cited in *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 Am. Dec. 203, holding subsequent parol acknowledgment does not make instrument binding; *Hanford v. McNair*, 9 Wend. 54, holding subsequent parol acknowledgment cannot make instrument binding on principal; *McDonald v. Eggleston*, 26 Vt. 154, 60 Am. Dec. 303, holding instrument under seal by one partner, creating new obligation, may be ratified by firm by parol.

Distinguished in *Blood v. Goodrich*, 9 Wend. 68, 24 Am. Dec. 121, holding subsequent written acknowledgment accompanied by acts recognizing deed as his own, proper evidence to be submitted to jury.

**Authority under seal, how proved.**

Cited in *Blood v. Goodrich*, 12 Wend. 525, 27 Am. Dec. 152, holding parol acknowledgment of such authority competent evidence; *Paine v. Tucker*, 21 Me. 138, 38 Am. Dec. 255, holding parol proof of acknowledgment of authority under seal not competent evidence of such authority.

**Parol evidence to contradict writing.**

Cited in note in 11 Eng. Rul. Cas. 231, on parol evidence to contradict written instrument.

S E. R. C. 624, *TUPPER v. FOULKES*, 9 C. B. N. S. 797, 7 Jur. N. S. 709, 30 L. J. C. P. N. S. 214, 3 L. T. N. S. 741, 9 Week. Rep. 349.

**Effect of subsequent ratification of agent's act which required prior authority.**

Cited in *Farmers' Loan & T. Co. v. Memphis & C. R. Co.* 83 Fed. 870, holding formal confirmation and ratification in writing of foreclosure of mortgage by attorney in fact binding on principal; *Pettigrew v. Doyle*, 17 U. C. C. P. 34, holding it makes act binding.

**Proof of authority to execute instrument under seal.**

Cited in *Lawrence v. Anderson*, 21 N. S. 466 (dissenting opinion), on necessity of proof of authority to execute instrument under seal.

S E. R. C. 634, *WILKS v. BACK*, 2 East, 142, 6 Revised Rep. 409.

**Form of execution of instrument for principal.**

Cited in *Gillaspie v. Wesson*, 7 Port. (Ala.) 454, 31 Am. Dec. 715, holding

that signature of persons contracting without authority, as officer of militia, in public service, is merely *descriptio personarum*; *Stringfellow v. Mariott*, 1 Ala. 573, holding that warranty signed in name of principal, S. M. for B. M. bound principal; *Bank of Newbury v. Baldwin*, 1 Cliff. 519, Fed. Cas. No. 892, holding that agent is not liable to be sued upon contracts made by him in behalf of his principal if name of principal is disclosed to person contracted with at time of making contract; *Hovey v. Magill*, 2 Conn. 680 (dissenting opinion), on effect of addition of word "agent" to signature to contract as binding principal only; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169, holding that administrator, who stipulates by instrument under seal, beyond his authority, is answerable personally for nonperformance of contract; *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70, holding that to bind principal, by act of agent, in execution of deed, no particular form of words is necessary; *Savings Bank v. Davis*, 8 Conn. 191, holding that agent may be duly appointed to convey land of incorporated bank, by note of board of directors, without power under corporate seal; *Wood v. Goodridge*, 6 Cush. 117, 52 Am. Dec. 771, holding that signing by attorney of name of principal to instrument, which contains nothing to indicate that it is executed by attorney, and without adding his own signature, is not valid execution; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521, holding that in contracts not under seal, if agent intends to bind principal and not himself; it will be sufficient if it appear in such contract that he act as agent; *Forsyth v. Day*, 41 Me. 382, holding that agent authorized to sign name of principal, effectually binds him by simply affixing to instrument name of his principal as if it were his own name; *Detroit v. Jackson*, 1 Dougl. (Mich.) 106, holding that where it distinctly appears in body of agreement, signed by agent in his own name, that principal is contracting party, agreement will be construed to be that of principal, and not of agent; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82, holding that promise made by agent of corporation collateral to debt of person in whose behalf it was made, where no words are used to indicate that it is promise of corporation, agent may be personally liable; *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 Am. Dec. 203, holding that note commencing "I promise to pay" &c. signed by agent with his own name, adding "Agt. Bellamy Mfn. Co." would bind company if agent had authority to execute note; *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 550 (dissenting opinion), on effect upon bond given in individual capacity, of addition of words "trustees"; *Delius v. Cawthorn*, 13 N. C. (2 Dev. L.) 90, holding that bond is act of person whose name and seal are affixed to it; *Godley v. Taylor*, 14 N. C. 178, holding that executors with power to sell lands are personally bound by covenant to warrant and defend &c.; *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634, holding that bond in which were words, "I promise to pay to the order &c., xx witness my hand and seal, signed by H. S. (seal) for C., president of company" imposed liability personally on; *Steele v. McElroy*, 1 Sneed, 341, holding that where persons representing themselves as committee on behalf of masonic lodge, contract in name of lodge, for erection of building, and in covenant obligate themselves for payment of price, they alone are liable on covenant; *Eckhart v. Reidel*, 16 Tex. 62, holding that if administrator give bond to convey land, he will be personally bound; *Roberts v. Burton*, 14 Vt. 195, holding that if agent have authority and credit is given principal, agent is not liable though contract is signed by agent; *Maritime Bank v. Guardian Assur. Co.* 19 N. B. 297, holding that policy must be sealed with corporate seal of insurance company; *Hyndman v. Williams*, 8 U. C. C. P. 293, holding that no right of entry was reserved under lease purporting to be made by R. W. attorney for H. reserving right of entry "by said R. W. but not saying "as such

attorney"; *Kandick v. Arthur*, 17 N. S. 289, holding that writ of summons signed by deputy clerk is *prima facie* valid and burden is upon person seeking to show invalidity; *Steiglitz v. Eggington*, 8 E. R. C. 622, *Holt*, N. P. 141, 17 Revised Rep. 620, on form of execution by agent for principal.

Cited in note in 42 L.R.A.(N.S.) 15, on liability of one signing contract in representative capacity.

Cited in *Browne Stat. Frauds* 5th ed. 18, on formalities for conveying estates in land; *Parsons Partn.* 4th ed. 183, on liability of partnership on joint and several note of partner.

#### —Necessity of execution in name of principal.

Cited in *Carter v. Doe*, 21 Ala. 72, holding that conveyance under seal must be executed in name of principal and signed with his name, and sealed with his seal; *Haskell v. Cornish*, 13 Cal. 45, holding that if, on face of note executed by agent, signing his own name simply, it appears that agent executed it in behalf of principal, principal and not agent is bound; *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631, holding that execution of lease by president of corporation, in his own name, for the corporation, will be good and binding upon corporation; *Mears v. Morrison*, *Breese* (Ill.) 172, holding that agent should sign principal's name and then his own name as agent; *Harper v. Hampton*, 1 Harr. & J. 622, holding that deed by attorney should be executed in name of the principal; *Deming v. Bullitt*, 1 Blackf. 241, holding that in private contract, when man describes himself as agent, but covenants that he himself or principal will do certain thing, and executes deed in his own name, he alone is liable; *Hunter v. Miller*, 6 B. Mon. 612, holding that agent should contract in name of principal and not in his own name; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65, holding that agent must set to instrument the name and seal of principal and not merely his own; *Decker v. Freeman*, 3 Me. 336, holding that vote of proprietors, authorizing committee to sell lands, empowers them also to make deeds, in name of proprietors; *Ismon v. Loder*, 135 Mich. 345, 97 N. W. 769, holding that section 9500 of compiled laws does not require that deed of corporation shall have its corporate name subscribed thereto, but signatures of proper officers are sufficient; *Coburn v. Ellenwood*, 4 N. H. 99, holding that deed of clerk of proprietors, of common land executed in his own name passed no title where such proprietors voted that such clerk should give deed in name of proprietors; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330, holding that instrument executed by agent is sufficient, where it is executed in name of principal and not in agent's name; *Townsend v. Corning*, 23 Wend. 435, holding that covenant for sale of land, where made by agent, to be valid must be executed in name of principal by A. B. his attorney; *Townsend v. Hubbard*, 4 Hill, 351, holding that sealed instrument, when executed by one acting as attorney, must be executed in name of principal, and purport to be sealed with his seal; *Locke v. Alexander*, 9 N. C. (2 Hawks) 155, 11 Am. Dec. 750, holding that execution of deed should be in name of principal, and if it be execution of agent only, it is void as to principal; *Heffernan v. Addams*, 7 Watts. 116, holding that in execution of deed by one person for another, under power of attorney, name of principal must be used in some form or other; *Welsh v. Parish*, 1 Hill, L. 155, holding that bill of sale made by agent in his own name does not bind principal; *Pryor v. Coulter*, 1 Bail. L. 517; *Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453,—holding that contract under seal made by agent will not bind principal, unless made in name of principal; *Lynch v. William Richards Co.* 37 N. B. 549, holding that to constitute written assignment of debt by corporation, it must be



either under corporate seal, or executed in name of company by duly authorized agent; *Berkeley v. Hardy*, 2 E. R. C. 271, 5 Barn. & C. 355, on necessity of executing in principal's name.

Cited in note in 8 E. R. C. 641, on necessity of execution of deed by attorney in name of principal.

#### — Deeds.

Cited in *Skinner v. Gunn*, 9 Port. (Ala.) 305, holding that mere addition of words "attorney for L. S." to his signature, by obligor of deed, cannot control deed, and vary obligations entered into; *Noblesboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22, holding that deed executed by agent in his own name is deed of principal, if it appears that it was intention of parties to bind principal; *Martin v. Almond*, 25 Mo. 313; *Mussey v. Scott*, 7 Cush. 215, 54 Am. Dec. 719,—holding that deed, purporting to be deed of A., and executed "B for A," is well executed as deed of A. if B. was duly authorized to execute it; *Shuetze v. Bailey*, 40 Mo. 69, holding that agent to bind his principal by deed, must have authority under seal; *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262, holding that deed which appears upon its face to have been executed in name of owner by her attorney in fact though not in approved form, is deed of owner; *Montgomery v. Dorion*, 7 N. H. 475, holding that deed of land made in name of principal, but executed by attorney, reciting his power of attorney, was sufficient to pass title of principal; *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176, holding that deed executed as follows "D. K., attorney for Z. K." was sufficient to pass interest of principal; *Tenney v. East Warren Lumber Co.* 43 N. H. 343, holding that deed signed by officers of corporation is binding upon corporation if such officers were authorized to execute deed; *Robbins v. Austin*, 42 Hun, 469, holding that deed signed, Francis Meriam, attorney, by Eliza Meriam, passes title where instrument as whole showed that Eliza Meriam was owner, and Francis, attorney; *Evans v. Wells*, 22 Wend. 324, holding that no particular form of words is required in execution of deed by agent, so long as it is in name of principal; *Scott v. McAlpin*, 4 N. C. (Term Rep.) 155, 7 Am. Dec. 703, holding that where attorney in fact conveys land in his own name, without reference to power given him, or to his principal, nothing passes by the deed; *Warner v. Mower*, 11 Vt. 385, holding that business corporation may convey land by deed of president and such deed may be sealed with seal of the president; *Wheelock v. Moulton*, 15 Vt. 519, holding that deed signed by all shareholders of corporation will not pass title; *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 274, holding that deed signed W. W. agent for Flower Brook Manufacturing Co., was sufficient to show that corporation executed deed, where by resolution he was empowered to execute deed and granting part of deed recites such power; *Stinchcomb v. Marsh*, 15 Gratt. 202; *Clarke v. Courtney*, 5 Pet. 319, 8 L. ed. 140,—holding that deed by person acting under power of attorney must be executed in name of principal.

Cited in note in 41 L.R.A.(N.S.) 811-813, 815, 816, on form of execution of deed by attorney in fact or agent.

8 E. R. C. 642, *PARKER v. TASWELL*, 2 De G. & J. 559, 4 Jur. N. S. 1006, 27 L. J. Ch. N. S. 812, 6 Week. Rep. 608.

#### Specific performance of agreement for lease.

Cited in *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429, holding specific performance of covenant to renew lease will be enforced where there has been part performance by one side; *Coles v. Peek*, 96 Ind. 333, 49 Am. Rep. 161, holding agreement to renew lease on condition that building be built, or to purchase



improvements, will be enforced where party seeking relief has done all he reasonably could do to consummate agreement; *Flood v. Chancey*, Newfoundl. Rep. (1884-96) 404, holding covenant to renew lease will not be enforced where it is based on a condition precedent which has not been performed; *Colton v. Rookledge*, 19 Grant, Ch. (U. C.) 121, holding contract to take a lease enforceable, where contract on one part has been substantially performed; *Zimbler v. Abrahams* [1903] 1 K. B. 577, 72 L. J. K. B. N. S. 103, 88 L. T. N. S. 46, 51 Week. Rep. 343, 19 Times L. R. 189, holding agreement to grant lease may be enforced in equity.

#### **— Defective lease good as promise to make lease.**

Cited in *Hobbs v. Ontario Loan & Debenture Co.* 18 Can. S. C. 483, on specific performance of agreement to lease, unenforceable because within statute of frauds; *Re Erly*, 2 Ont. App. Rep. 617, holding agreement to lease, performed on one side, will be enforced in equity though lease was never reduced to writing; *Martin v. Smith*, L. R. 9 Exch. 50, 43 L. J. Exch. N. S. 42, 30 L. T. N. S. 268, 22 Week. Rep. 336, 8 Eng. Rul. Cas. 646, holding where tenant enters under agreement for term which is void as lease, agreement may be enforced in equity by decree for specific performance.

#### **Specific enforcement of partly executed agreement.**

Cited in *Boardman v. Davidson*, 7 Abb. Pr. N. S. 439, to the point that though plaintiff has failed to establish precise terms of contract sought to be specifically enforced, courts will look into answer and proofs and establish terms of agreement where answer admits agreement with modification; *Eckel v. Bostwick*, 88 Wis. 493, 60 N. W. 78½, on partial performance as ground for decreeing specific performance; *Bettridge v. Great Western R. Co.* 3 U. C. Err. & App. 58, holding that specific performance of alleged contract for free pass as consideration of conveyance of rectory land to railway company would not be decreed.

Cited in note in 6 Eng. Rul. Cas. 691, on necessity of completeness and certainty of contract to entitle to specific performance.

#### **Sufficiency of written memorandum to take case out of statute of frauds.**

Cited in *Ball v. Bridges*, 30 L. T. N. S. 430, 22 Week. Rep. 552, holding memorandum of parol contract required to be in writing by statute insufficient where it is incomplete and is qualified; *Burn v. Strong*, 14 Grant, Ch. (U. C.) 651, holding that parol agreement for right to dig gold on land is not invalid under statute of frauds, where entry was made and work begun.

Cited in note in 8 E. R. C. 651, on operation in equity as valid agreement of contract or agreement.

#### **Mistake in execution of contract.**

Cited in *Hillock v. Button*, 29 Grant, Ch. (U. C.) 490, holding court will not interfere where mistake has been on one side only.

#### **Construction of statutes.**

Cited in 2 Sutherland, Stat. Const. 2d ed. 777, on effect given to change in phraseology of statute in construing same.

8 E. R. C. 646, *MARTIN v. SMITH*, 43 L. J. Exch. N. S. 42, L. R. 9 Exch. 50, 30 L. T. N. S. 268, 22 Week. Rep. 336.

#### **Effect of taking possession under verbal lease for term required to be in writing.**

Cited in *Magee v. Gilmour*, 17 Ont. Rep. 620, holding tenant bound to give up

possession at end of stipulated period without notice to quit; *Re Erly*, 2 Ont. App. Rep. 617, holding it makes tenancy one from year to year.

Cited in note in 42 L.R.A.(N.S.) 651, on nature of tenancy created by entry under lease void under statute of frauds.

#### **Sufficiency of consideration to support promise.**

Cited in *Marie v. Garrison*, 13 Abb. N. C. 210, on promise enforceable in equity as sufficient consideration for other promise.

8 E. R. C. 653, *EX PARTE MELBOURN*, 40 L. J. Bankr. N. S. 25, L. R. 6 Ch. 64, 23 L. T. N. S. 578, 19 Week. Rep. 83.

#### **Rights of litigants under foreign laws.**

Cited in *Stuart v. Baldwin*, 41 U. C. Q. B. 446, on application of foreign law to rights of litigants.

8 E. R. C. 660, *TAYLOR v. SPARROW*, 4 Giff. 703, 9 Jur. N. S. 1226, 9 L. T. N. S. 438.

8 E. R. C. 663, *STANFORD v. ROBERTS*, L. R. 6 Ch. 307, 19 Week. Rep. 552.

#### **Custody of title deeds, who entitled to.**

Cited in *Leathes v. Leathes*, L. R. 5 Ch. Div. 221, 8 Eng. Rul. Cas. 666, 46 L. J. Ch. N. S. 562, 36 L. T. N. S. 646, 25 Week. Rep. 492, holding tenant for life entitled to their custody, except where there is danger to their safety or court requires deeds for purpose of carrying out trusts relating to property.

Cited in 2 *Beach, Trusts*, 1428, as to when tenant for life is entitled to possession.

8 E. R. C. 666, *LEATHES v. LEATHES*, L. R. 5 Ch. Div. 221, 46 L. J. Ch. N. S. 562, 36 L. T. N. S. 646, 25 Week. Rep. 492.

#### **Right to custody of title deeds.**

Cited in note in 8 E. R. C. 671, on right to custody of title deeds.

8 E. R. C. 672, *FOSTER v. CRABB*, 12 C. B. 136, 16 Jur. 835, 21 L. J. C. P. N. S. 189.

#### **Right to possession of title deeds where entire interest is not in same person.**

Distinguished in *Wright v. Robotham*, L. R. 33 Ch. Div. 106, 55 L. J. Ch. N. S. 791, 55 L. T. N. S. 241, 34 Week. Rep. 668, holding owner of one of two estates cannot maintain action against depository in absence of owner of other estate; *Taylor v. Sparrow*, 8 E. R. C. 660, 4 Giff. 703, where the power of Chancery to adjudge between life tenant and remaindermen as to right to title deeds was the question.

#### **Special traverses in pleading.**

Cited in *Connell v. Owen*, 4 U. C. C. P. 113, on sufficiency of special traverse to present traverse on which issue in fact may be taken.

#### **Detainer as gist of action of detinue.**

Cited in note in 9 E. R. C. 318, on detainer as gist of action of detinue.

8 E. R. C. 682, *MANNERS v. MEW*, L. R. 29 Ch. Div. 725, 54 L. J. Ch. N. S. 909, 53 L. T. N. S. 84.

**Right of mortgagee to title deeds.**

Cited in note in 8 E. R. C. 705, 708, 709, on right of mortgagee to obtain possession of title deeds.

**Rights of bona fide purchasers.**

Cited in note in 21 Eng. Rul. Cas. 722, on rights of purchaser for value without notice.

**Priority between equities.**

Cited in note in 10 E. R. C. 529, on priority between equities in case of act or omission due to negligence or misplaced confidence.

8 E. R. C. 692, *BANK OF NEW SOUTH WALES v. O'CONNOR*, L. R. 14 App. Cas. 273, 58 L. J. P. C. N. S. 82, 60 L. T. N. S. 467, 38 Week. Rep. 465.

**Mortgagee's liability for costs of foreclosure.**

Cited in *Winters v. McKinstry*, 14 Manitoba L. Rep. 294, holding he may be chargeable where he has acted unreasonably and vexatiously.

**Effect of unaccepted tender on mortgage.**

Cited in note in 33 L.R.A. 238, on effect of unaccepted tender on lien of mortgage or pledge.

**Replevin to recover deed.**

Cited in note in 20 L.R.A. (N.S.) 508, on replevin to recover deed.

**Detainer as gist of action of detinue.**

Cited in note in 9 Eng. Rul. Cas. 318, on detainer as gist of action of detinue

8 E. R. C. 712, *SHAFTESBURY v. ARROWSMITH*, 4 Revised Rep. 181, 4 Ves. Jr. 66.

**Foundation for bill of discovery.**

Cited in *Price v. Tyson*, 3 Bland, Ch. 392, 22 Am. Dec. 279, holding where no relief is asked there can be no hearing on the merits.

Cited in note in 9 E. R. C. 546, on right of discovery as to all matters relevant to plaintiff's case in action for recovery of land.

**Grounds for discovery.**

Cited in *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426, holding court will not order discovery not material to cause; *Stillwell v. McNeely*, 2 N. J. Eq. 305, holding discovery will be compelled where object of complainant is to set aside as fraudulent deed on which adverse party claims title.

**—For inspection of writings.**

Cited in *Pennsylvania Co. v. Philadelphia, G. & N. R. Co.* 20 Phila. 332, 48 Phila. Leg. Int. 146, 9 Pa. Co. Ct. 517, holding on taking of deposition party cannot obtain inspection of instrument in which he has no common interest, and which forms part of adversary's defense; *Utah Constr. Co. v. Montana R. Co.* 145 Fed. 981, holding in equitable suit for accounting and to foreclose mechanic's lien, complainant is entitled to discovery of instruments necessary to establish his cause of action where they are in adversary's possession: *Nicholl v. Elliot*, 3 Grant, Ch. (U. C.) 536, holding party cannot obtain inspection of document which has no tendency to prove case or any part thereof necessary to obtain relief sought; *Bolton v. Liverpool*, 8 E. R. C. 718, 1 Myl. & K. 88, holding it improper to discover deeds to prove complainant's title by revealing the weakness of defendant's.

**Sufficiency of description of papers whose inspection is sought before issue joined.**

Cited in *Watson v. Renwick*, 4 Johns. Ch. 381, holding they must be described with reasonable certainty.

**Showing necessary to secure production of documents in adversary's possession.**

Cited in *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, on question of materiality; *United States v. Terminal R. Asso.* 154 Fed. 268, holding some evidence of materiality of documents whose inspection is sought must be produced.

Cited in note in 8 E. R. C. 726, on right to production of deeds sustaining one's title to land.

**Impertinent matter in pleading.**

Cited in *Price v. Tyson*, 3 Bland, Ch. 392, 22 Am. Dec. 279, holding it should be expunged.

**Equitable mortgage.**

Cited in *Almy v. Wilbur*, 2 Woodb. & M. 371, Fed. Cas. No. 256, holding mutuality of obligation necessary to create mortgage.

8 E. R. C. 718, *BOLTON v. LIVERPOOL*, Coop t. Brougham, 19, 1 L. J. Ch. N. S. 166, 1 Myl. & K. 88, Decision on former motion before the Vice Chancellor reported in 3 Sim. 467.

**Discovery of what allowed.**

Cited in *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 196, holding that in suit by gas company against city to enjoin enforcement of ordinance fixing price of gas, plaintiff cannot refuse to answer cross-bill for discovery on ground that evidence called for relates to matters which it would be required to prove; *Winder v. Dillenderfer*, 2 Bland, Ch. 166, holding that witness cannot demur, because question asked him is not pertinent to matter in issue; *Hamilton v. Street*, 1 Grant. Ch. (U. C.) 327, holding complainant entitled to discovery of documents where his case and adversary's so interwoven and inseparably connected that nothing could relate to one without relating to other; *Nicholl v. Elliot*, 3 Grant, Ch. (U. C.) 536, holding party not entitled to inspection of documents which do not affirmatively establish his title; *Brevoort v. Warner*, 8 How. Pr. 321, holding discovery as to books, papers and documents can only be on examination of party; *Jenkins v. Bushby*, 35 L. J. Ch. N. S. 400, 14 L. T. N. S. 431, 14 Week. Rep. 531, upholding discovery of documents in defendant's possession which tend to make out plaintiff's case; *Minet v. Morgan*, L. R. 8 Ch. 361, 42 L. J. Ch. N. S. 627, 28 L. T. N. S. 573, 21 Week. Rep. 467, holding party not compelled to produce muniments of title which he swears do not contain any thing supporting case of adversary or impeaching his own case.

**—Corporate records and writings.**

Cited in *Post & Co. v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540, holding bill for discovery may be maintained in one state against corporation of that state to disclose names of stockholders for institution of proceedings for individual liability on judgment against corporation in another state.

**Admissibility of communication to attorney.**

Cited in *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144, 42 N. W. 218, holding communications between attorney and client in one case privileged in sub-



sequent suit involving same parties and growing out of first suit; *Chahoon v. Com.* 21 Gratt. 822, holding statements made to counsel concerning matter in issue privileged; *March v. Ludlum*, 3 Sandf. Ch. 35, holding communication as to matter in dispute privileged; *Britton v. Lorenz*, 3 Daly. 23, holding communication between client and attorney admissible where client consents thereto; *Moore v. Bray*, 10 Pa. 519, holding that communications of object for which assignment of mortgage was made to counsel concerned for assignee, on distribution of proceeds of mortgaged premises are privileged; *State v. Snowden*, 23 Utah, 318, 65 Pac. 479, holding that under statute conversation between attorney and client during negotiations for employment are privileged; *State v. Douglass*, 20 W. Va. 770, holding that professional communications are meant every fact which attorney has learned only in his character as attorney; *Minet v. Morgan*, L. R. 8 Ch. 361, 42 L. J. Ch. N. S. 627, 28 L. T. N. S. 573, 21 Week. Rep. 467, holding party will not be compelled to produce confidential correspondence between himself or predecessors in title and their respective solicitors concerning matter in suit, although made before litigation was contemplated; *Holmes v. Baddeley*, 14 L. J. Ch. N. S. 113, 1 Phill. Ch. 476, 9 Jur. 289, holding opinion of counsel as to matter in contemplation of suit, privileged; *Bristol v. Cox*, L. R. 26 Ch. Div. 678, 53 L. J. Ch. N. S. 1144, 50 L. T. N. S. 719, 33 Week. Rep. 255, holding opinion of counsel as to matter in suit, privileged, whether given before or after action commenced.

Cited in *Weeks, Attys.* 2d. ed. 297, as to whether privilege of communication to attorney is confined to pending suits; *Weeks, Attys.* 2d ed. 623, on punishment of attorney for disclosing secrets learned from client.

Distinguished in *Mitchell's Case*, 12 Abb. Pr. 249, 3 E. D. Smith. 89, holding under statute making party competent witness when called by adversary, attorney may be made to testify and papers intrusted to attorney in confidence not necessarily confidential communications; *Stone v. Minter*, 111 Ga. 45, 50 L.R.A. 356, 36 S. E. 321, holding communication by client to attorney in presence of adversary as to transaction in hand not privileged.

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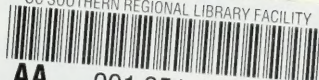








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